EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

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No. 1753

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals
3-72

No. 1753

UNITED STATES CIRCUIT COURT OF APPEALS

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THE MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

WILLIAM DENMAN, Attorney for Plaintiff in Error,

Kohl Building, San Francisco, California.

FRANK & MANSFIELD, Attorneys for Defendant in Error,

Merchants' Exchange Bldg., San Francisco, California.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED,

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY,

Plaintiff and Defendant in Error.

Order [Filed May 13, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 10th day of June, A. D. 1909.

W. C. VAN FLEET,

Judge.

[Endorsed]: In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Maritime Insurance Company, Limited, Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Company, Plaintiff and Defendant in Error. Order Extending Time to File Record on Appeal, and to Docket Case. Filed May 13, 1909. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY,
Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED,
Defendant.

Order [Filed May 13, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which the defendant may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 10th day of June, 1909.

W. C. VAN FLEET,
Judge.

[Endorsed]: No. 13,835. In the Circuit Court of the United States, Ninth Circuit Northern District of California. M. S. Dollar Steamship Company,

Plaintiff, vs. Maritime Insurance Company, Limited, Defendant. Order Extending Time to File Record on Appeal and to Docket Case. Filed May 13, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED,

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY,

Plaintiff and Defendant in Error.

Order [Filed June 7, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 10th day of July, A. D. 1909.

MORROW,

Judge.

[Endorsed]: In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Maritime Insurance Company, Limited, Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Co., Plaintiff and Defendant in Error. Order Extending Time to File Record on Appeal and to Docket Case. Filed Jun. 7, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED,

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY,

Plaintiff and Defendant in Error.

Order [Filed June 14, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 12th day of July, 1909.

MORROW,

Judge.

[Endorsed]: In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Maritime Insurance Co., Ltd., Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Co., Plaintiff and Defendant in Error. Order Extending Time to File Record on Appeal and to Docket Case. Filed Jun. 14, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),
Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),
Plaintiff and Defendant in Error.

Order [Filed July 6, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 26th day of July, A. D. 1909.

MORROW,
Judge.

[Endorsed]: In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Maritime Insurance Company, Limited, Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Company, Plaintiff and Defendant in Error. Order Extending Time to File Record on Appeal and to Docket Case. Filed Jul. 6, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED,

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY,

Plaintiff and Defendant in Error.

Stipulation [Filed July 24, 1909] to Extend Time to File Record on Appeal and to Docket Case.

It is hereby stipulated by and between the parties hereto that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, may be extended to and including the 5th day of August, A. D. 1909.

WILLIAM DENMAN,

Attorney for Defendant and Plaintiff in Error.

NATHAN K. FRANK.

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Maritime Insurance Company, Limited, Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Co., Plaintiff and Defendant in Error. Stipulation to Extend Time to File Record on Appeal and to Docket Case. Filed Jul. 24, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED,

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY,

Plaintiff and Defendant in Error.

Order [Filed July 24, 1909] Extending Time to File Record on Appeal and to Docket Case.

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 5th day of August, A. D. 1909.

WM. C. VAN FLEET,

Judge.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Maritime Insurance Co., Ltd., Defendant and Plaintiff in Error, vs. M. S. Dollar Steamship Co., Plaintiff and Defendant in Error. Order Extending Time to File Record on Appeal. Filed Jul. 24, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant and Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff and Defendant in Error.

Stipulation [and Order, Filed Aug. 5, 1909] Extending Time to File Record on Appeal and to Docket Case.

It is hereby stipulated by and between the parties hereto that the appellant herein may have to and including the fifteenth day of August, 1909, within which to file the record on appeal in the above case and docket the case with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, at San Francisco, California.

FRANK & MANSFIELD,

Attorneys for M. S. Dollar Steamship Company.

WILLIAM DENMAN,

Attorney for Maritime Insurance Company.

It is so ordered.

W. C. VAN FLEET,

Judge.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Maritime Insurance Co., Ltd., a Corporation, Defendant and Plain-

tiff in Error, vs. M. S. Dollar Steamship Co., a Corporation, Plaintiff and Defendant in Error. Stipulation and Order Extending Time to File Record on Appeal and to Docket Case. Filed Aug. 5, 1909. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MARITIME INSURANCE COMPANY, Limited (a Corporation),

Plaintiff in Error,

vs.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Defendant in Error.

Order [Filed Aug. 14, 1909] Enlarging Time to Docket Cause and to File Record on Writ of Error.

Good cause appearing therefor, it is ordered that the Maritime Insurance Company, Limited, a corporation, plaintiff in error, have to and including August 16, 1909, within which to file its Record on Writ of Error and to Docket Cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 14, 1909.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Enlarging Time to File Record Thereof and to Docket Cause. Filed Aug. 14, 1909. F. D. Monckton, Clerk.

No. 1753. United States Circuit Court of Appeals for the Ninth Circuit. Nine Orders Enlarging Time to File Record Thereof and to Docket Cause. Refiled Aug. 16, 1909. F. D. Monckton, Clerk.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, Limited (a Corporation),

Defendant.

Complaint.

Plaintiff above named complains of defendant above named, and for cause of action alleges:

I.

That at all the times hereinafter mentioned, the said plaintiff was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

II.

That at all the times hereinafter mentioned, the defendant was, and still is, a corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, having its principal place of business in the City of London, England, and having an agency and place

of business in the City and County of San Francisco, State of California, and at all of said times said defendant was, and still is, a citizen and subject of said United Kingdom of Great Britain and Ireland.

III.

That on the 22d day of December, 1904, the said defendant Maritime Insurance Company, Limited, for a good and valuable consideration, did insure the said plaintiff, M. S. Dollar Steamship Co., as well in their own name as for and in the name and names of every other person or persons to whom the subject matter of said policy does, may, or shall appertain in part or in all, upon the hull, materials, machinery and boilers and everything connected therewith, of the ship or vessel called the "M. S. Dollar," in the sum of Three Thousand Pounds (3,000) in the money of the United Kingdom of Great Britain and Ireland, then and there being equivalent to Fourteen Thousand Five Hundred and Eighty (14,580) Dollars United States Gold Coin.

That the said insurance was an insurance lost or not lost at and from San Francisco to Vladivostock, while there, and thence back to a safe neutral port, warranted to clear on or before January 31st, 1905, or held covered at premium to be arranged.

IV.

That in and by the terms of said contract of insurance the said steamer was insured against the risk of capture, seizure and detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of riots,

insurrections, hostilities or warlike operations either before or after declaration of war, and with liberty to run blockades. A copy of said policy is hereto attached, marked Exhibit "A," and hereby specially referred to and made a part hereof.

V.

That on the 31st day of December, 1904, the said steamer "M. S. Dollar" cleared and departed from said port of San Francisco on a voyage to Vladivostock, Siberia, and continued on said voyage and was so duly prosecuting the same at the time of her capture as hereinafter set forth.

VI.

That on the —— day of February, 1904, war was declared by the Empire of Japan against the Empire of Russia, and hostilities existed and warlike operations were at all times herein mentioned being conducted between the said Empire of Japan and said Empire of Russia.

VII.

That thereafter the said vessel proceeded on her said voyage until she arrived at a point off of the Island of Yezo near the Straits of Tsugaru, at which place the said vessel was seized, captured and detained on the 26th day of January, 1905, by a Japanese man-of-war acting under and by authority of the Emperor of Japan, which said seizure was then and there duly authorized by and in the prosecution of hostilities between said Empire of Japan and said Empire of Russia, and thereafter, to wit, on the —— day of ———, 1905, said vessel was condemned and then and there by said belligerent confiscated.

VIII.

That the said plaintiff's interest in said vessel at the time of effecting the said insurance and at the time of her loss herein alleged, was equal in amount to her said value as in said policy set forth.

IX.

That by reason of such seizure, capture and detention, and as a consequence thereof, the said steamer then and there became and was a total loss by the perils in said policy insured against.

X.

That thereafter, and upon the first day of February, 1905, and before the commencement of this action, the said plaintiff duly abandoned the said vessel to said defendant.

XI.

That after the said seizure, capture and detention aforesaid, and more than sixty days before the commencement of this action, the said plaintiff furnished said defendant with due and proper proofs of loss and interest in said property, and otherwise performed all the covenants and conditions in said contract of insurance on its part to be performed.

XII.

That the said plaintiff has, by reason of the said seizure, capture and detention of said vessel as aforesaid, and by reason of the loss of said vessel by said perils insured against, suffered loss and damage in the sum of Fourteen Thousand Five Hundred and Eighty (14,580) Dollars.

XIII.

That thereafter the said plaintiff demanded pay-

ment of the said defendant of the said sum, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part thereof has been paid.

Wherefore, said plaintiff prays for judgment against said defendant for said sum of Fourteen Thousand Five Hundred and Eighty (14,580) Dollars, together with interest thereon from said first day of February, 1905, and its costs herein.

FRANK & MANSFIELD,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Robert Dollar, being first duly sworn, deposes and says: That at all the times in the foregoing complaint mentioned he was, and still is, an officer of the Corporation plaintiff herein, to wit, the President thereof; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

ROBERT DOLLAR.

Subscribed and sworn to before me this 13th day of November, 1905.

ROBT. J. TYSON,
Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A" [to Complaint].

HULL.

Directors:
Edward H. Cookson,
Chairman.

J. F. Caroe,
Deputy Chairman.

Arthur W. Bibby.
J. Kirke Crooks.
Rowland E. L. Naylor.
William S. Patterson.
Joshua Sing.

HEAD OFFICE:
Liverpool,
Brown's Buildings.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicholson.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's, Castle St. Branch.

MARITIME INSURANCE COMPANY
Limited
LONDON AGENCY.

London Agenc
80 Cornhill, E.

Agent:
William Arm

Bankers:
Robarts, Lubroc

No. 40/37804 L'pool A/c £ 3000.

The risk not to commence before the expiration of the previous policies.

~~General Average payable as per Foreign~~ Custom, or per York-Antwerp rules, if in accordance with the contract of ~~affreightment~~.

W. A.

The Warranty and Conditions as to average under three per cent to be applicable to each voyage, as if separately insured, and ~~not to the whole time insured.~~

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and/or Dry Dock or Docks during the currency of this Policy.

WHEREAS, it hath been proposed t the MARITIME INSURANCE COM PANY LIMITED, by M. S. DOLLAI STEAMSHIP CO. as well in their ow name as for and in the name and name of all and every other person or person to whom the subject matter of this Pol icy does, may or shall appertain in par or in all to make with the said Com pany the insurance hereinafter men tioned and described.

NOW THIS POLICY WITNESS ETH that in consideration of the sai person or persons effecting this Polic promising to pay the said Company th sum of seven hundred and eighty-seve pounds 10/— as a premium at and afte the rate of twenty-five guineas per Cent for such Insurance the said Compan takes upon itself the burthen of suc Insurance to the amount of Thre thousand pounds and promises an agrees with the Insured their Execu tors, Administrators and assigns in al respects truly to perform and fulfill th Contract contained in this Policy AND it is hereby agreed and declare that the said Insurance shall be and is a Insurance (lost or not lost) at and fron San Francisco to Vladivostock, whil there and thence back to a safe neutra port.

To return £ 5 per cent for loading o or before 31st December, 1904.

To return £ 5 per cent for no claim under this policy.

Warranted to clear on or before 31st January, 1905, or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the warranted free of capture, seizure & detention clause in marine policy or policies.

With liberty to run blockades.

(Stamp)

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows:

On HULL AND MATERIALS,

Valued at .....£ ——

MACHINERY AND BOILERS,

Valued at .....£ ——

& everything connected therewith

——— £ 37050

of the Ship or Vessel called the "M. S. DOLLAR" whereof ..... is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of after such mooring, or until sailing on next voyage whichever may first occur. AND that it shall be lawful

for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. ~~AND touching the Adventures and Perils which the said Company is contented~~ to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment ~~or Damage of the aforesaid subject matter of this Insurance or any part thereof.~~ AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defense Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance, ~~the charges whereof the said Company will bear in proportion to the sum hereby insured.~~ AND it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment. ~~AND it is further agreed, that if the Ship hereby insured shall~~ come into collision with any other Ship or Vessel, and the Insured shall in consequence thereof become liable to pay and shall pay to the persons interested in ~~such other Ship or Vessel, or in the freight thereof or~~

in the goods or effects on board thereof any sum or sums of money not exceeding the value of the Ship hereby Insured calculated at the rate of eight pounds per ton on her registered tonnage this Company will pay the Insured such proportion of three-fourths of the sums so paid as the sum hereby Insured bears to the value of the Ship hereby Insured calculated at the rate of eight pounds per ton or if the value hereby declared amounts to a larger sum then to such declared value and in cases where the liability of the Ship has been contested with our consent in writing this Company will also pay a like proportion of three-fourth part of the costs thereby incurred or paid provided also that this clause shall in no case extend to any sum which the Insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever. AND it is declared and agreed that the Ship shall be and is warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations whether before or after declaration of war.

IN WITNESS whereof the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto

set their hands in London, the twenty-second Day of December, 1904.

W. ARMIT,
Agent in London.

Examined—W. A.

[Endorsed]: Filed November 13, 1905. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Summons.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),
Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),
Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of the said Circuit Court, in the City and County of San Francisco.

FRANK and MANSFIELD,
Attorneys for Plaintiff.

The President of the United States of America, Greeting: To Maritime Insurance Company, a Corporation, Defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above brought against you in the Circuit Court of the United States,

Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of November, in the year of our Lord one thousand nine hundred and five and of our Independence the 130th.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within Summons on the 14 day of Nov., 1905, and personally served the same on the 14th day of Nov., 1905, upon Maritime Insurance Co., a corporation, the defendant therein named, by delivering to and leaving with John Livingstone, Secretary of said Maritime Insurance Co., said defendant named therein person-

ally, at the city and county of San Francisco in said district, an attested copy thereof, together with a copy of the Complaint, attached thereto.

Dated at San Francisco, this 15 day of Nov., 1905.

JOHN H. SHINE,
U. S. Marshal.
By R. De Lancie,
Deputy.

[Endorsed]: Filed November 15th, 1905. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Demurrer [to Complaint.]

Now comes the above-named defendant and demurring unto the complaint of plaintiff on file herein for ground of demurrer specifies:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That it appears upon the face of said complaint that the above-entitled court has not jurisdiction of the person of this defendant.

3. That it appears upon the face of said complaint that the above-entitled court has not jurisdiction of the subject of the action.

Wherefore, plaintiff prays to be hence dismissed with its costs of suit herein.

T. C. VAN NESS,
Attorney for Defendant.

Service of the within Demurrer admitted this 20th day of December, A. D. 1905.

FRANK & MANSFIELD,
Attorneys for Plff.

[Endorsed]: Filed December 20th, 1905. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1905, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco on Monday, the 15th day of January, in the year of our Lord one thousand nine hundred and six. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

No 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INS. C.

Order Overruling Demurrer to Complaint.

The demurrer to complaint herein came on this day to be heard and was argued by the attorneys for the

respective parties, and thereupon it is by the Court ordered that said demurrer be and is overruled; and on motion of defendant's attorney defendant is allowed to file an amended special demurrer herein within five days from this time; to which ruling defendant's attorney is allowed an exception.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LTD. (a Corporation),

Defendant.

Notice of Motion to File Amended Demurrer.

To Plaintiff and to Nathan Frank, Its Attorney:

You and each of you will please take notice that on Monday, the 22d day of January, 1906, defendant will move this Court for leave to file an amended demurrer herein, a copy of which is served herewith.

T. C. VAN NESS, and
WILLIAM DENMAN,
Attorneys for Defendant.

Due cause appearing therefor, it is hereby ordered that the time for the service of the above notice is hereby shortened to two days.

MORROW,
Judge.

[Endorsed]: Filed January 18, 1906. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LTD. (a Corporation),

Defendant.

Amended Demurrer to Complaint.

Now comes the defendant, and demurring to the complaint on file herein for cause of demurrer avers:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That the said complaint is ambiguous in this: that it cannot be ascertained therefrom what policy is meant by the words, "said policy," in line six, paragraph III of said complaint, and in line twenty-four, paragraph IV of said complaint.

III.

That the said complaint is uncertain for the reason set forth in paragraph II hereof.

IV.

That said complaint is unintelligible for the reason set forth in paragraph two hereof.

V.

That the said complaint is uncertain in this: that it cannot be ascertained therefrom whether the "policy" referred to in line twenty-five, paragraph IV of said complaint was ever executed by the defendant, or that it was ever delivered by said defendant or that it was ever delivered to plaintiff.

VI.

That said complaint is unintelligible for the reason set forth in paragraph V hereof.

VII.

That said complaint is ambiguous for the reason set forth in paragraph V hereof.

VIII.

That the said complaint is ambiguous in this: that it cannot be ascertained therefrom whether plaintiff sues to recover on the agreement to insure, set forth in paragraph III of said complaint, or upon the written instrument set forth in the exhibit attached to said complaint.

IX.

That the said complaint is unintelligible for the reason set forth in paragraph VIII hereof.

X.

That the said complaint is uncertain for the reason set forth in paragraph VIII hereof.

XI.

That the said complaint is ambiguous in this: That it cannot be ascertained therefrom what "risks" are referred to as covered by the insurance in the paragraph beginning on line seven, page two of the exhibit attached to said complaint.

XII.

That the said complaint is unintelligible for the reason set forth in paragraph XI hereof.

XIII.

That said complaint is uncertain for the reason set forth in paragraph XI hereof.

XIV.

That the said complaint is ambiguous in this: that it cannot be ascertained therefrom what the clause is which is referred to as the "capture, seizure and detention clause" in the paragraph beginning on line seven, page two of the exhibit attached to said complaint.

XV.

That said complaint is unintelligible for the reason set forth in paragraph XIV hereof.

XVI.

That said complaint is uncertain for the reason set forth in paragraph XIV hereof.

XVII.

That said complaint is ambiguous in this: that it cannot be ascertained therefrom what the "marine policy or policies" are which are referred to in the paragraph beginning on line seven, page two of the exhibit attached to said complaint.

XVIII.

That said complaint is unintelligible for the reason set forth in paragraph XVII hereof.

XIX.

That said complaint is uncertain for the reason set forth in paragraph XVII hereof.

Wherefore defendant prays it be hence dismissed with its costs of suit herein.

T. C. VAN NESS,
Attorney for Defendant.

WILLIAM DENMAN,
Of Counsel.

[Endorsed]: Filed January 19, 1906. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1905, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco, on Monday, the 22d day of January, in the year of our Lord one thousand nine hundred and six: Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INS. CO., LTD.

Order Granting Motion for Leave to File Amended Demurrer.

Defendant's motion for leave to file an amended demurrer herein came on this day to be heard, and after argument by the attorneys for the respective parties, it was ordered that said motion be and hereby is granted, and plaintiff allowed an exception to this ruling.

At a stated term, to wit, the March term, A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco, on Monday the 9th day of April, in the year of our Lord one thousand nine hundred and six: Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INS. CO., LTD.

Order Sustaining Amended Demurrer to Complaint.

Defendant's amended demurrer to complaint herein came on this day to be heard, and after argument by counsel and consideration by the Court, it is ordered that said demurrer be and hereby is sustained with leave to plaintiff to file amended complaint under the rule.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Amended Complaint.

Now comes the plaintiff above named, and by leave of Court first had and obtained, files this its amended complaint in the above-entitled action, and for cause of action against said defendant, alleges:

I.

That at all the times hereinafter mentioned, the said plaintiff was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

II.

That at all the times hereinafter mentioned, the defendant was, and still is, a corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, having its principal place of business in the City of London, England, and having an agency and place of business in the City and County of San Francisco, State of California, and at all of said times said defendant was, and still is, a citizen and subject of said United Kingdom of Great Britain and Ireland.

III.

That on the 22d day of December, 1904, the said defendant Maritime Insurance Company, Limited, for a good and valuable consideration, issued to said plaintiff its policy of insurance (a copy of which is hereto attached marked Exhibit "A" and hereby expressly referred to and made a part hereof),

wherein and whereby said defendant did insure the said plaintiff, M. S. Dollar Steamship Co., as well in their own name as for and in the name and names of every other person or persons to whom the subject matter of said policy does, may, or shall appertain in part or in all, upon the hull, materials, machinery and boilers and everything connected therewith, of the ship or vessel called the "M. S. Dollar," in the sum of Three Thousand pounds (£3,000) in the money of the United Kingdom of Great Britain and Ireland, then and there being equivalent to Fourteen Thousand Five Hundred and Eighty (14,580) Dollars, United States Gold Coin.

That the said insurance was an insurance lost or not lost at and from San Francisco to Vladivostock, while there, and thence back to a safe neutral port, warranted to clear on or before January 31st, 1905, or held covered at premium to be arranged.

IV.

That the said policy so issued as aforesaid, is an usual form of marine policy, containing the warranted free of capture, seizure and detention clause as follows:

"Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, either before or after declaration of war."

That in said policy the said clause and warranty so referred to as aforesaid, is canceled, and the said policy in and by its terms expressly covers the risks

in said clause mentioned, and the said steamer was then and there by the terms of said policy, insured against the risk of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, hostilities or warlike operations, either before or after declaration of war, and with liberty to run blockades.

V.

That on the 31st day of December, 1904, the said steamer "M. S. Dollar" cleared and departed from said port of San Francisco on a voyage to Vladivostock, Siberia, and continued on said voyage and was so duly prosecuting the same at the time of her capture as hereinafter set forth.

VI.

That on the——day of February, 1904, war was declared by the Empire of Japan against the Empire of Russia, and hostilities existed and warlike operations were at all times herein mentioned being conducted between the said Empire of Japan and said Empire of Russia.

VII.

That thereafter the said vessel proceeded on her said voyage until she arrived at a point off of the Island of Yezo near the Straits of Tsugaru, at which place the said vessel was seized, captured and detained on the 26th day of January, 1905, by a Japanese man-of-war acting under and by authority of the Emperor of Japan, which said seizure was then and there duly authorized by and in the prosecution of hostilities between said Empire of Japan and said

Empire of Russia, and thereafter, to wit, on the—— day of ————, 1905, said vessel was condemned and then and there by said belligerent confiscated.

VIII.

That the said plaintiff's interest in said vessel at the time of effecting the said insurance and at the time of the loss herein alleged, was equal in amount to her said value as in said policy set forth.

IX.

That by reason of such seizure, capture and detention, and as a consequence thereof, the said steamer then and there became and was a total loss by the perils in said policy insured against.

X.

That thereafter, and upon the first day of February, 1905, and before the commencement of this action, the said plaintiff duly abandoned the said vessel to said defendant.

XI.

That after the said seizure, capture and detention aforesaid, and more than sixty days before the commencement of this action, the said plaintiff furnished said defendant with due and proper proofs of loss and interest in said property, and otherwise performed all the covenants and conditions in said contract of insurance on its part to be performed.

XII.

That the said plaintiff has, by reason of the said seizure, capture and detention of said vessel as aforesaid, and by reason of the loss of said vessel by said perils insured against, suffered loss and

damage in the sum of Fourteen Thousand Five Hundred and Eighty ($14,580) Dollars.

XIII.

That thereafter the said plaintiff demanded payment of the said defendant of the said sum, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part thereof has been paid.

Wherefore, said plaintiff prays for judgment against said defendant for said sum of Fourteen Thousand Five Hundred and Eighty ($14,580) Dollars, together with interest thereon from said first day of February, 1905, and its cost herein.

FRANK and MANSFIELD,
Attorneys for Plaintiff.

Exhibit "A" [to Amended Complaint].

HULL. 7/6

Directors:
Edward H. Cookson,
Chairman.

J. F. Caroe,
Deputy Chairman.

Arthur W. Bibby.
J. Kirke Crooks.
Rowland E. L. Naylor.
William S. Patterson.
Joshua Sing.

HEAD OFFICE:
Liverpool,
Brown's Building.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's, Castle St. Branch.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicholson,

MARITIME INSURANCE COMPANY, Limited

London Agency.

London Agency:
80 Cornhill, E. C.

Agent:
William Armit.

Bankers:
Roharts, Lubbock & Co.

No. 40/37804 L'pool A/c £ 3000.

The risk not to commence before the expiration of the previous policies.

~~General Average payable as per Foreign~~ Custom, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

W. ARMIT.

Stet. but so far as war risk is concerned only

~~The Warranty and Conditions as to average under three per cent to be applicable to each Voyage, as if separately insured, and not to the whole time thereon.~~

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and/or dry Dock or Docks during the currency of this Policy.
(Stamp)

WHEREAS it hath been proposed to the MARITIME INSURANCE COMPANY LIMITED by M. S. DOLLAR STEAMSHIP CO. as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay the said Company the sum of seven hundred and eighty seven pounds 10/— as a premium at and after the rate of Twenty-five guineas per Cent. for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Three thousand pounds, and promises and agrees with the Insured their Executors Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said insurance shall be and is an Insurance (lost or not lost) at and from SAN FRANCISCO to VLADIVOSTOCK, while there and thence back to a safe neutral port.

To return £5 per cent for loading on or before 31st December 1904.

To return £5 per cent for no claim under this policy.

Warranted to clear on or before 31st January 1905 or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the Warranted free of capture seizure & detention clause in Marine policy or policies.

With liberty to run blockade.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows

valued at £

ON HULL AND MATERIALS,

Valued at.....£———

MACHINERY AND BOILERS,

Valued at.....£———

& everything connected therewith £37050

of the Ship or Vessel called the "M. S. DOLLAR" whereof ..... is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of ....after such mooring, or until sailing on next voyage whichever may first occur. AND that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. ~~AND touching the adventures and perils which the said Company~~ is contented to bear and does take upon itself in the Voyage so insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints ~~and Detainments of all Kings Princes and People of~~

~~what Nation Condition or Quality soever Barratry~~ of the Master and Mariners and of ~~all other~~ Perils Losses and Misfortunes ~~that~~ have or shall come to the Hurt ~~Detriment~~ or Damage of the aforesaid ~~subject matter of this Insurance or any part thereof.~~ AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance ~~the charges whereof the said Company will bear in proportion to the sum hereby Insured.~~ AND it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the property Insured shall not be considered a waiver or acceptance of abandonment. ~~AND it is further agreed, that if the Ship hereby insured shall come~~ into collision with any other Ship or Vessel, and the Insured shall in consequence thereof become liable to pay and shall pay to the persons interested in such other Ship or Vessel or in the freight thereof or in the goods or effects on board thereof any sum or sums of money not exceeding the value of the Ship hereby insured calculated at the rate of eight pounds per ton on her registered tonnage this Company will pay the Insured such proportion of three-fourths of the sums so paid as the sum hereby Insured bears to the value of the ship hereby Insured calculated at the rate of eight pounds per ton or if the value hereby declared amounts to a larger ~~sum then to such declared value and in cases where~~

~~the liability of the Ship has been contested with our~~ consent in writing this Company will also pay a like proportion of three-fourth part of the costs thereby incurred or paid provided also that this clause shall in no case extend to any sum which the Insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever. AND it is declared and agreed that the Ship shall be and is warranted free from ~~average under Three Pounds per centum unless general or the ship be stranded sunk or burnt~~.

~~Warranted free of capture seizure and detention~~ and the consequences thereof or of ~~any~~ attempt thereat piracy excepted, ~~and~~ also from all consequences of ~~riots~~, insurrections, hostilities, or ~~warlike operations whether before or after declaration of war~~.

IN WITNESS WHEREOF the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto set their hands in LONDON, the twenty-second day of December, 1904.

W. ARMIT, Agent in London.

Examined W. ARMIT.

Endorsed:

88564

No. 40/37804 L'pool A/c.

It is requested that in case of damage which may involve a claim under this policy, notice, when practicable, be given to Underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.

MARITIME INSURANCE COMPANY, LIMITED, Liverpool.

London 22/12 1904.

Assured—M. S. Dollar S. S. Co. Ld.

Ship—M. S. Dollar.

Voyage—Frisco to Vladivostock

On Hull

£3000 at 25 gs. per cent.

NOTICE.—The Insured are particularly requested to read their Policies.

~~Pay to the order of C. T. Bowring & Co. Insurance, Ltd.~~

~~M. S. DOLLAR STEAMSHIP CO.,~~

~~By ROBERT DOLLAR, Pres.~~

Claimed hereon December sailing

£3000 at 5%	£150.00
10%	15.00
	£135.00

(Registered for Enclosure to Robert Dollar Co., from C. T. Bowring & Co. (Insurance) Limited, London.)

Settled 5 May /05

MARITIME INSURANCE CO.,

A. ARMIT, London.

State of California,

City and County of San Francisco,—ss.

Robert Dollar, being first duly sworn, deposes and says: That at all the times in the foregoing Amended Complaint mentioned he was, and still is, an officer of the Corporation plaintiff herein, to wit, the Presi-

dent thereof; that he has read the foregoing Amended Complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

ROBERT DOLLAR.

Subscribed and sworn to before me this 18th day of July, 1906.

[Seal] ROBT. J. TYSON,

Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of copy of the within admitted this 18th day of July, 1906.

VAN NESS & DENMAN,
Attorney for Defendant.

[Endorsed]: Filed July 19, 1906. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, in and for the Northern District of California.

M. S. DOLLAR STEAMSHIP COMPANY,
Plaintiff,

vs.

MARITIME INSURANCE COMPANY,
Defendant.

Demurrer to Amended Complaint.

Now comes the defendant and demurring to the amended complaint herein avers:

I.

That said complaint does not contain facts sufficient to constitute a cause of action.

II.

That the said complaint is uncertain in this: that it does not appear therefrom what, if any, interest plaintiff had in the steamship "M. S. Dollar."

III.

That the said complaint is unintelligible in this: that it does not appear therefrom what the policy or policies are that are referred to in the fifth paragraph of the policy pleaded and relied upon; and further because it does not show what the risks are that are excluded from said policy or policies and included in the policy pleaded.

IV.

That the said complaint is unintelligible in this: that it does not appear therefrom what, if any, interest plaintiff had in the steamship "M. S. Dollar."

V.

That the said complaint is uncertain in this: that it does not appear therefrom what the policy or policies are that are referred to in the fifth paragraph of the policy pleaded and relied upon; and further because it does not show what the risks are that are excluded from said policy or policies and included in the policy pleaded.

Wherefore, defendant prays that it be hence dismissed with its costs.

VAN NESS & DENMAN,
Attorneys for Defendant.

Service of the within Demurrer, etc., admitted this 27th day of July, A. D. 1906.

FRANK and MANSFIELD,
Attorneys for Plaintiff.

[Endorsed]: Filed July 27th, 1906. Southard Hoffman, Clerk.

At a stated term, to wit, the November term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 7th day of November, in the year of our Lord one thousand nine hundred and six. Present: The Honorable CHARLES E. WOLVERTON, District Judge, District of Oregon, designated to hold and holding this Court.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INSURANCE CO.

Order Sustaining Demurrer to Amended Complaint.

Defendant's demurrer to the amended complaint herein, heretofore heard and submitted to the Court for consideration and decision, being now fully considered and the Court having delivered and filed its opinion, it is in accordance with said opinion ordered that said demurrer be and the same hereby is sustained.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Amendment to Amended Complaint.

Now comes the plaintiff in the above-entitled action, and by leave of Court first duly had, amends its amended complaint on file therein, by striking out of said amended complaint the eighth article thereof, beginning with the words "That the said plaintiff," on line 7 of page 4 of said amended complaint, and ending with the words "policy set forth," on line 10 of page 4 thereof, and inserting in lieu thereof the following:

"VIII.

"That at the time of effecting the said insurance, and at the time of the loss herein alleged, the said plaintiff was the equitable owner of said steamer, as well as the charterer thereof, and was also the owner of all of the stock of the corporation which held the legal title to said vessel; that heretofore and before the time of effecting said insurance as in said amended complaint set forth, said plaintiff had caused the Arab Steamship Company, a corporation,

to be organized at Victoria, British Columbia; that said Arab Steamship Company was at all of the times in said amended complaint mentioned, and still is, a corporation, organized and existing under and by virtue of the laws of the Dominion of Canada, with its principal place of business at the city of Victoria, British Columbia; that before the time of effecting said insurance as in said amended complaint set forth, the said M. S. Dollar Steamship Company had purchased the said steamer 'M. S. Dollar,' and had paid the purchase price thereof out of its, the said M. S. Dollar Steamship Company's, own funds; that thereupon, and before the time of effecting said insurance as in said amended complaint set forth, the said M. S. Dollar Steamship Company had by bill of sale, duly made, executed and delivered to said Arab Steamship Company, caused the legal title of said steamer 'M. S. Dollar' to be conveyed to said Arab Steamship Company, and in consideration of said conveyance, the said Arab Steamship Company did then and there issue and deliver to said M. S. Dollar Steamship Co. the entire capital stock of the said Arab Steamship Company, of which said capital stock the said M. S. Dollar Steamship Company ever since has been and now is the true and bona fide owner and holder; that at all of said times said Arab Steamship Company was possessed of no property or assets other than the said steamship 'M. S. Dollar'; that in further consideration of said conveyance and transfer of the legal title of said steamship to it as aforesaid, and at the same time, the said Arab Steamship Company

made, executed and delivered to said M. S. Dollar Steamship Company a charter-party wherein and whereby the said Arab Steamship Company did charter unto said M. S. Dollar Steamship Company the said steamer 'M. S. Dollar' for the term of ninety-nine years, which said term at the time of effecting said insurance and at the time of said loss, had still over ninety years to run; that it was in said charter-party provided that said M. S. Dollar Steamship Company should, during said term, keep maintain, repair, man, victual, provide and operate the said steamer entirely at its, the said M. S. Dollar Steamship Company's own cost and expense, and should during said term receive and retain for its, the said M. S. Dollar Steamship Company's own use and benefit, all of the proceeds and earnings of said steamer 'M. S. Dollar'; that said steamer was at all of the times in said amended complaint mentioned, being operated under said arrangement, and was at all of said times yielding a large profit to said M. S. Dollar Steamship Co."

FRANK and MANSFIELD,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Robert Dollar, being first duly sworn, deposes and says: That at all the times in the foregoing Amendment to the Amended Complaint mentioned he was, and still is, an officer of the corporation plaintiff herein, to wit, the President thereof; that he has read the foregoing Amendment and knows the contents thereof; that the same is true of his own knowl-

edge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

ROBERT DOLLAR,
President.

Subscribed and sworn to before me this 23d day of November, 1906.

[Seal] ROBT. J. TYSON,
Notary Public in and for said City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 23d, 1906. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Demurrer to Amended Complaint and to Amendment to Amended Complaint.

Now comes the defendant and demurring to the amended complaint and to the amendment thereof for cause of his demurrer avers:

I.

That the said amended complaint fails to state facts sufficient to constitute a cause of action.

II.

That the said amended complaint is uncertain in this: that it does not appear therefrom,

(1) By what court, *if any,* the condemnation or confiscation mentioned in paragraph VII of said complaint was decreed if at all.

(2) What decree, if any, was rendered by said court.

(3) What the facts were that "duly authorized" the seizure, mentioned in said paragraph VII.

The above allegations of the complaint as to condemnation, seizure and confiscation being mere conclusions of law it may well be, *as far as shown by the complaint,* that the seizure was not *in fact* "duly authorized" by the alleged war; that as a fact the "condemnation" and "confiscation" were by a drumhead court and the seizure, condemnation and confication were mere acts of "piracy" which the policy does not cover; construing the complaint against the pleader the latter must be presumed the fact.

III.

That the said amendment to said amended complaint is ambiguous in this; that the plaintiff first claims as owner of all the capital stock of the corporation owning the "M. S. Dollar," and later as charterer; and it is uncertain also in which capacity plaintiff claims, granted that a policy in hull form can insure an interest in a charter-party.

IV.

That the said complaint is uncertain in this: that it cannot be determined therefrom:

(a) What the warranted free of capture, seizure and detention clause is, that is referred to in the policy used upon and set forth in full in the complaint;

(b) How, if at all, said clause excludes any risks from any marine policy or policies;

(c) What risks, if any, are excluded by said clause.

V.

That the said complaint is uncertain in this: that the written contract set out and relied upon insures against risks excluded by a certain clause in marine policy or policies; while in paragraph VIII of said complaint the insurance is against risks excluded by a certain clause set forth and described as the "usual form."

As the contract does not refer to a clause in the usual form, but to the clause in marine policy or policies, it is uncertain what relevancy there can be in alleging that the contract is in the usual form, it appearing that there is no warranted free of capture, seizure or detention clause in the policy pleaded.

VI.

That the said complaint is uncertain in this that it cannot be determined therefrom whether the clause alleged in paragraph IV thereof to have been "canceled," was canceled before or after the execution of the instrument.

VII.

That said complaint is ambiguous in this: that it alleges in paragraph IV on page 2 that the policy sued on is a policy "containing" a certain clause,

while in the same paragraph on the next page it alleges that the said clause in the policy is canceled.

Wherefore, the defendant prays that its demurrer be sustained and that it be hence dismissed with its costs.

T. C. VAN NESS,
VAN NESS & DENMAN,
Attorneys for Defendant.

Receipt of a copy of the within is hereby admitted this 17th day of Dec., 1906.

FRANK and MANSFIELD.

[Endorsed]: Filed December 17, 1906. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 11th day of February, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable JOHN J. DE HAVEN, District Judge.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INSURANCE CO., LTD.

Order Overruling Demurrer to Amended Complaint and to Amendment to Amended Complaint.

Defendant's demurrer to amended complaint and to amendment to amended complaint heretofore heard

and submitted to the Court for consideration and decision, it is in accordance with the opinion of Honorable Edward Whitson, District Judge for the Eastern District of Washington, Ordered that said demurrer be and the same hereby is overruled.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Answer to Amended Complaint [and to Amendment to Amended Complaint].

Now comes the defendant above named, and answering the amended complaint and the amendment to the amended complaint on file herein, for its defense denies, admits and alleges as follows:

I.

Denies that at any time in the said amended complaint mentioned the defendant had an agency or any agent in the City and County of San Francisco, State of California, or in the State of California, with any power or authority to take any action whatsoever with reference to the contract of insurance alleged in the said amended complaint to have been executed by the said defendant on the 22d day of December, 1904.

II.

Denies that the policy of insurance described in the said amended complaint is an usual form of marine policy. Denies that the said policy contains, or at any time contained, any warranted free of capture, seizure and detention clause. Denies that the said policy contains, or contained, any warranted free of capture, seizure and detention clause as follows:

Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, either before or after declaration of war.

Denies that the said policy in all its terms, or at all, or expressly, or at all, covers the risks in said clause mentioned. Denies that the said steamer "M. S. Dollar" was by the terms of the said policy insured against the risk of capture, seizure and detention, or capture or seizure or detention, or the consequences thereof. Admits that the said steamer "M. S. Dollar" in the said amended complaint described was at liberty to run blockades.

III.

Denies that on the 31st day of December, 1904, or at any time in the said amended complaint mentioned, or at all, the said steamer "M. S. Dollar" cleared on a voyage to Vladivostock, Siberia.

IV.

Answering paragraph VI on page 3 of said amended complaint, defendant alleges that it has no information or belief upon the subject of the declaration of war by the Empire of Japan against the

Empire of Russia and the existence of hostilities and war-like operations between said Empire of Japan and the said Empire of Russia sufficient to enable it to answer the allegations of the said paragraph of said amended complaint on that behalf, and basing its denial on that ground denies that on the —— day of ————, 1904, or at any time, war was declared by the Empire of Japan against the Empire of Russia, but admits that hostilities existed and war-like operations were at the times mentioned in the said amended complaint being conducted between the said Empire of Japan and the said Empire of Russia.

V.

Answering paragraph VII of said amended complaint, defendant has no information or belief upon the subject sufficient to enable it to answer, deny or admit the allegation that the vessel proceeded, or that she was seized or captured by a Japanese man-of-war acting under or by the authority of the Emperor of Japan, or at all, on said voyage, or that said seizure was then and there duly authorized by and in the prosecution of hostilities between the said Empire of Japan and the said Empire of Russia, and basing its denial on the said ground, denies that the said "M. S. Dollar" proceeded on said voyage insured against until she arrived off the Island of Yezo near the Straits of Tsugaru. Denies that on said voyage the said vessel was seized and captured by a Japanese man-of-war acting under and by the authority of the Emperor of Japan, or otherwise than as in the Third Separate Defense hereinafter set forth, or at all, but admits that said detention was then and there duly

authorized by, or in the prosecution of, hostilities between the Empire of Japan and the Empire of Russia. Denies that the said vessel was condemned and confiscated, or condemned or confiscated, as in said paragraph VII set forth, or at all, save as hereinafter set forth in the Third Separate Defense herein.

VI.

Answering paragraph VIII of said amended complaint, as amended, defendant has no information or belief upon the subject sufficient to enable it to answer any of the allegations of paragraph VIII, and basing its denial on that ground denies that at the time of effecting the insurance in said amended complaint described, and at the time of the loss in said amended complaint alleged, or at either of said times, the plaintiff was the equitable or other owner of the said steamer "M. S. Dollar," or was the charterer thereof, or was the owner of all of the stock of the corporation which held the legal title to said vessel. Denies that before the time of effecting said insurance as in the said amended complaint set forth, or at all, the plaintiff had caused the Arab Steamship Company, a corporation, to be organized at Victoria, British Columbia, or at all. Denies that the said Arab Steamship Company was at all the times in said amended complaint mentioned, or still is, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada. Denies that before the time of effecting the said insurance, or at all, the said M. S. Dollar Steamship Company had purchased the said steamer "M. S.

Dollar," and had paid, or had paid, the purchase price thereof out of its, the said M. S. Dollar Steamship Company's own funds. Denies that before the time of effecting the said insurance the said M. S. Dollar Steamship Company had, by bill of sale duly made, executed and delivered to the said Arab Steamship Company, or at all, caused the legal title of the said steamer "M. S. Dollar" to be conveyed to the said Arab Steamship Company. Denies that in consideration of the said conveyance, or at all, the said Arab Steamship Company did then and there issue and deliver, or issue or deliver, to the said M. S. Dollar Steamship Company the entire capital stock of the said Arab Steamship Company, and denies that the said M. S. Dollar Steamship Company ever since has been, and now is, or has been or now is, the true and bona fide owner and holder, or owner or holder, at all of any of said stock. Denies that at all of the said times, or at any of the said times, the said Arab Steamship Company was possessed of any property or assets other than the said steamship "M. S. Dollar." Denies that in further consideration of any conveyance and transfer, or conveyance or transfer, of the legal title of the said steamship, or any title thereof, the said Arab Steamship Company made, executed or delivered, or made or executed or delivered to the M. S. Dollar Steamship Company a charter-party wherein and whereby, or wherein or whereby, the said Arab Steamship Company did charter unto the said M. S. Dollar Steamship Company the said steamer "M. S. Dollar" for the term of ninety-nine (99) years, or at all. Denies that it

was in said charter-party provided that the said M. S. Dollar Steamship Company should, during the said term, keep, maintain, repair, man, victual, provide and operate, or keep or maintain or repair or man or victual or provide or operate the said steamer entirely or at all at its the said M. S. Dollar Steamship Company's, cost and expense, or cost or expense, and denies that the said M. S. Dollar Steamship Company should, during the said term, or any term, receive and retain, or receive or retain, for its own use and benefit, all or any of the proceeds and earnings, or proceeds or earnings, of said steamer "M. S. Dollar." Denies that the said steamer was at all or any of the times in said amended complaint mentioned being operated under said, or any arrangement in said amended complaint described, and that it was at any of the said times yielding a large, or any, profit to said M. S. Dollar Steamship Company.

VII.

Answering paragraph IX of said amended complaint, defendant has no information or belief upon the subject sufficient to enable it to answer the allegations thereof, and basing its denial on that ground denies that by reason of any capture, seizure and detention, or capture or seizure or detention, and as a consequence thereof, or as a consequence thereof, the said steamer "M. S. Dollar" then and there, or at all, became and was, or became or was, a total, or any, loss, by the perils in said policy insured against.

VIII.

Answering paragraph XI of said amended com-

plaint defendant has no information or belief upon the subject of the allegations of the said paragraph sufficient to enable it to answer the said allegations, and basing its denial on said ground denies that after the said seizure, capture and detention aforesaid, and more than sixty (60) days before the commencement of this action, or at all, the plaintiff furnished the said defendant with due and proper, or any, proofs of loss and interest, or loss or interest, in the said property. Denies that at said times, or at all, plaintiff performed all or any of the covenants and conditions or covenants or conditions, in the said contract of insurance on its part to be performed.

IX.

Answering paragraph XII of said amended complaint defendant has no information or belief upon the subject sufficient to enable it to answer the allegations thereof, and basing its denial upon the said ground denies that the plaintiff has, by reason of the said seizure, capture and detention, in said amended complaint described, or seizure or capture or detention, and by reason of the loss of the said vessel by said, or any, perils insured against, or by reason of any loss of the said vessel, suffered loss and damage or loss or damage, in the sum of Fourteen Thousand Five Hundred Eighty (14,580), dollars, or any sum whatsoever.

SECOND SEPARATE DEFENSE.

And now comes the defendant, and further answering said amended complaint, and for a defense thereto, admits, alleges and denies as follows:

I.

Alleges that the said policy of insurance in the said amended complaint described was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, at the time in the said amended complaint alleged; that defendant is informed and believes, and upon its information and belief alleges that the law of Great Britain at all the times in said amended complaint mentioned was that an injured person should not conceal from his insurer on a marine risk any facts which if known to the insurer, might prevent him from undertaking the risk, and that a concealment of such facts avoided a policy of insurance given by such insurer to such person; that at the time of the making of said policy the plaintiff well knew that all of the cargo of said M. S. Dollar Steamship Company consisted of provisions and fodder destined for Vladivostock, a locality in Russian territory, of such a nature that the said cargo might have been considered to be intended for the Russian army or navy; that it was the law of Japan at all of the times in the said amended complaint described, that any British vessel carrying a cargo entirely, or more than one-half, made up of provisions and fodder to such locality was liable to condemnation and confiscation, and that at no time did plaintiff disclose to defendant the said nature of the cargo, or that it was contraband of war, but at all times did plaintiff conceal from defendant such facts; that defendant did not know the said nature of the said cargo, and that if it had known the same, it might have prevented defendant from issu-

ing said policy; that the said policy contemplated the war risk of running a blockade, if a blockade were declared on the Port of Vladivostock before said voyage in said amended complaint described was terminated, and did not contemplate a risk of condemnation for carrying contraband of war; that at the time of the issuance of the said policy no such blockade had been declared, and that said policy was against the risk of capture, seizure and detention in running such blockade, if declared; that defendant had no knowledge of such concealment until long after the termination of the voyage insured against; that defendant is informed and believes and upon such information and belief alleges, that plaintiff well knew that said voyage was to be falsely described in the ship's charter-party, copies of bills of lading, log-book, engineer's log-book, journal, clearance certificate, bill of health and other ship's papers, as to Moji, in Japan, whereas in truth and in fact the said ship at no time intended to sail to Moji, Japan, but at all times intended to sail to Vladivostock, Russia; that plaintiff well know that said cargo was in said documents to be described as destined for Moji, Japan, whereas in truth and in fact none of said cargo was destined for Moji, Japan, but all the said cargo of the said vessel was destined for Vladivostock, Russia; that plaintiff at no time communicated to defendant the said intentions regarding the said documents of the said ship, but at all times concealed the same from defendant, and that defendant at no time knew of the said false documents or of the intended use of the same, until long after the ter-

mination of the said voyage; that the said loss of the said "M. S. Dollar," if the said vessel were lost, by capture, seizure and detention, or capture or seizure or detention, or the consequences thereof, was by reason of the carriage of the aforementioned cargo and the false documents aforementioned; that if the defendant had known of the intent to use said false documents, it might have prevented it from executing the said policy so sued upon. That the said use of the said false documents to conceal the destination of the said cargo as aforesaid materially increased the risk of capture, seizure and detention on the said voyage. That defendant upon learning of said concealment, tendered to plaintiff all moneys received by it as premium on said policy. That the said carriage of the said cargo materially increased the risk of capture, seizure and detention on the said voyage.

THIRD SEPARATE DEFENSE.

And further answering unto said amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Defendant is informed and believes, and upon such information and belief alleges that the said "M. S. Dollar," while proceeding on the voyage described in the said amended complaint, was on the 26th day of January, 1905, detained by the "Asama," a man-of-war of the Japanese Empire; that the captain of the "Asama" did thereupon demand, in the name of the Emperor of Japan, the "M. S. Dollar's" certificate of nationality, her charter-party, under which she was being operated, her bills of lading, her cargo in-

ventory, her clearance certificate from San Francisco, her bill of health, her log-book, her journal and her Chief Engineer's log-book; that the plaintiff did then and there produce the log-book, the journal and the Chief Engineer's log-book, and did give the same to the captain of the "Asama"; that the true course of said vessel had heretofore been from San Francisco to and through Muchi Channel, by the Koodile Islands, in the direction towards La Perouse Strait, where the ship was prevented from passing through the strait by floating ice; that La Perouse Strait is a strait on the more northerly course from San Francisco to Vladivostock, and not on any course, but far from any course from San Francisco to Moji, Japan; that thereafter the said "M. S. Dollar," navigating southward, passed through Iturup Channel and was going toward Vladivostock via Tsuruga Strait; that in her log-book, journal and Chief Engineer's log-book plaintiff caused the route of the said vessel through the Muchi Channel, by the Koorile Islands and towards La Perouse Strait, to be concealed and her route to be falsely shown as if she taken the direct course from San Francisco to Tsuruga Strait; that the copies of the bills of lading kept by plaintiff on said ship gave the detination of her cargo as Moji, Japan, whereas all of said cargo was destined for Vladivostock, in Siberian Russia; that the clearance certificate of the said vessel from San Francisco gave the destination of the said vessel as Moji, Japan, whereas in truth the destination of the said vessel was Vladivstock, Russia; that the plaintiff gave all such false papers, to wit, the false copies of the bills of lad-

ing, false clearance certificate, false log-book, false journal, false engineer's log-book, to the captain of the said "Asama," as aforesaid, representing to him that the said false documents were in fact true and did truly describe the destination of the said cargo and the said vessel and the course of the said vessel, that the captain of the said "Asama" did thereupon cause the said vessel to be taken by the Empire of Japan, and that thereafter the said vessel was by the Yokasuka Prize Court, a court duly organized and existing under and by virtue of the laws of Japan with jurisdiction in prize cases, by its decree therein duly given and made, a copy whereof is fully set forth and hereunto annexed, marked Exhibit "A," and hereby made a part hereof, did condemn the said vessel, as described in the amended complaint, and that no other condemnation or confiscation of the said vessel was had at any time on the said voyage. That the carrying of said false papers increased the risk of capture, seizure and detention of said vessel on said voyage, and such carrying and such delivery by plaintiff caused the condemnation in said decree set forth.

FOURTH SEPARATE DEFENSE.

And further answering said amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

That the plaintiff impliedly warranted, in the acceptance of the said policy in said amended complaint described, and the said policy impliedly warranted, that the said "M. S. Dollar," so sailing from

San Francisco on the voyage insured against, should be properly documented, i. e., that she should have on board, in proper form, all proper neutrality papers, indicating truly the character of her cargo, her nationality, her destination, and the route at all times pursued thereto.

II.

Defendant is informed and believes and upon such information and belief alleges that at no time on the said voyage did the plaintiff provide the said "M. S. Dollar" with the said proper neutrality papers, but on the contrary the said plaintiff provided to the said vessel false and simulated papers, to wit, a false clearance certificate, false charter-party, false copies of bills of lading, false bill of health, false cargo inventory and false log-books, wherein the destination of the said vessel and the said cargo was described as Moji, in Japan, whereas in truth and in fact the said cargo and vessel were not destined for Moji, Japan, but were destined for Vladivostock, in Siberia, Russia; that the said log-books so supplied by plaintiff falsely described the voyage in question as heretofore set forth in the Third Defense hereof; that the detention and condemnation and the loss of the said vessel, if any loss there be, were caused solely by plaintiff's falsifications and false pretentions above-mentioned; that the said policy of insurance in the said amended complaint described was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, at the time in the said amended complaint alleged; that defendant is informed and believes, and upon its information and

belief alleges that the law of Great Britain at all the times in said amended complaint mentioned was: that the insurer and policy of marine insurance impliedly warrant the carriage by the vessel of the neutrality papers above described, and it was at said times a further law of Great Britain that a breach of said implied warranty avoids the policy.

III.

That the carriage of the said false and simulated papers on board the said vessel, and said failure to carry proper neutrality papers on the said vessel materially increased the risk of the said vessel's capture, seizure and detention on the said voyage and were the cause of the condemnation of the said vessel and the cause of the loss of the said vessel, if loss there be.

FIFTH SEPARATE DEFENSE.

And further answering unto said amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

That the said policy of insurance in the said amended complaint described was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, at the time in the said amended complaint alleged; that defendant is informed and believes, and upon such information and belief alleges, that the law of Great Britain at all the times in said amended complaint mentioned was: that a stockholder in a corporation may not, as stockholder therein, insure the property of the corporation except as against loss to his interest in his stock

therein, and that a stockholder in a corporation owning a vessel cannot insure his interest in the stock by policy of marine insurance insuring the hull of a vessel owned by the corporation.

II.

Answering paragraph VIII of said amended complaint, defendant has no information or belief upon the subject sufficient to enable it to answer any of the allegations of paragraph VIII, and basing its denial on that ground denies that at the time of effecting the insurance in said amended complaint described, and at the time of the loss in said amended complaint alleged, or at either of said times, the plaintiff was the equitable or other owner of the said steamer "M. S. Dollar," or was the charterer thereof, or was the owner of all of the stock of the corporation which held the legal title to said vessel. Denies that before the time of effecting said insurance as in the said amended complaint set forth, or at all, the plaintiff had caused the Arab Steamship Company, a corporation, to be organized at Victoria, British Columbia, or at all. Denies that the said Arab Steamship Company was at all the times in said amended complaint mentioned, or still is, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada. Denies that before the time of effecting the said insurance, or at all, the said M. S. Dollar Steamship Company had purchased the said steamer "M. S. Dollar" and had paid, or had paid, the purchase price thereof out of its, the said M. S. Dollar Steamship Company's own funds. Denies that before the time of effecting the said insurance

the said M. S. Dollar Steamship Company had, by bill of sale duly made, executed and delivered to the said Arab Steamship Company, or at all, caused the legal title of the said steamer "M. S. Dollar" to be conveyed to the said Arab Steamship Company. Denies that in consideration of the said conveyance, or at all, the said Arab Steamship Company did then and there issue and deliver, or issue or deliver, to the said M. S. Dollar Steamship Company the entire capital stock of the said Arab Steamship Company, and denies that the said M. S. Dollar Steamship Company ever since has been, and now is, or has been or now is, the true and bona fide owner and holder, or owner or holder, at all of any of said stock. Denies that at all of the said times, or at any of the said times, the said Arab Steamship Company was possessed of any property or assets other than the said steamship "M. S. Dollar." Denies that in further consideration of any conveyance and transfer, or conveyance or transfer, of the legal title of the said steamship, or any title thereof, the said Arab Steamship Company made, executed or delivered, or made or executed or delivered to the M. S. Dollar Steamship Company a charter-party wherein and whereby, or wherein or whereby, the said Arab Steamship did charter unto the said M. S. Dollar Steamship Company the said steamer "M. S. Dollar" for the term of ninety-nine (99) years, or at all. Denies that it was in said said charter-party provided that the said M. S. Dollar Steamship Company should, during the said term, keep, maintain, repair, man, victual, provide and operate, or keep or maintain or repair or

man or victual or provide or operate the said steamer entirely or at all at its, the said M. S. Dollar Steamship Company's, cost and expense, or cost or expense, and denies that the said M. S. Dollar Steamship Company should, during the said term, or any term, receive and retain, or receive or retain, for its own use and benefit, all or any of the proceeds and earnings, or proceeds or earnings, of said steamer "M. S. Dollar." Denies that the said steamer was at all or any of the times in said amended complaint mentioned being operated under said, or any, arrangement in said amended complaint described, and that it was at any of the said times yielding a large, or any, profit to said M. S. Dollar Steamship Company.

SIXTH SEPARATE DEFENSE.

And further answering said amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Alleges that the said policy of insurance in the said amended complaint described was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, at the time in the said amended complaint alleged; that defendant is informed and believes, and upon its information and belief alleges that the law of great Britain at all the times in said amended complaint mentioned was that an insured person should not conceal from his insurer on a marine risk any facts which if known to the insurer, might prevent him from undertaking the risk, and that a concealment of such facts avoided a policy of insurance given by such insurer to such

person, and defendant alleges and admits that at all of the times in said complaint mentioned the said Empire of Japan and the said Empire of Russia were engaged in the commission of warlike acts, each against the other, and amongst other acts, as defendant is informed and believes, and upon such information and belief alleges, the cruisers and war vessels of the Empire of Russia were at all said times cruising in and about the waters surrounding the Empire of Japan, and that at all of the times subsequent to the First day of December, A. D. 1904, and until the condemnation of the said "M. S. Dollar" vessels carrying cargo to Moji or other ports in Japan were liable to the risk of capture, seizure and detention by the said cruisers of the Empire of Russia; that notwithstanding the said danger and the fact that the said cargo and the said vessel were in fact destined for the Port of Vladivostock, in Russia, the plaintiff furnished and supplied to the said "M. S. Dollar" a charter-party, journal and copies of bills of lading of all cargo carried by her, and log-book, and clearance papers, and Chief Engineer's log-book, in which the destination of the said vessel and cargo was described as Moji, Japan; that in addition to the said papers, plaintiff supplied to the "M. S. Dollar" a certain other journal and log-book, in which the said voyage was properly described, and the various stages thereof properly described as from San Francisco to Vladivostock; that the carriage of the said dual set of papers, to wit, the said true and the said false log-book and journal, and the said false copies of bills of lading, clearance papers and charter-party,

greatly increased the risk of the capture of the said vessel and her seizure and detention and her condemnation by the cruisers of the Russian Navy; that at the time of the issuance of the said policy plaintiff well knew that it intended to supply the said vessel with the said false papers so describing the destination of the vessel and cargo as Moji, Japan; that at no time did it inform defendant of its intention so to do, but that at all times it concealed said intention from the defendant, and that defendant at no time knew said intention until long after the completion of the said voyage; and defendant is further informed and believes and upon such information and belief alleges, that it was at all the times in said amended complaint mentioned, the law of Great Britain that any act of any insured person under a policy of marine insurance tending to materially increase the risk of loss under said policy of insurance, avoided the said policy of insurance and relieved the insurer therein from any liability thereupon; that defendant upon learning of said concealment tendered to plaintiff all moneys received by it as premium on said policy.

Wherefore, defendant prays for judgment against the plaintiff, and its costs herein.

T. C. VAN NESS,
WILLIAM DENMAN,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

William Denman, being first duly sworn, deposes and says:

That he is the attorney for the Maritime Insurance Company, Limited, the defendant in the above-entitled cause; that he resides in the City and County of San Francisco, State of California; that the defendant is absent from the said City and County and is a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and that for this reason the verification is not made by the said defendant; that he has read the said answer, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters he believes it to be true.

WILLIAM DENMAN.

Subscribed and sworn to before me this 29th day of March, 1907.

[Seal] CEDA DE ZALDO,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A" [to Answer to Amended Complaint and to Amendment to Amended Complaint].

YOKOSUKA PRIZE COURT.

JUDGMENT.

THE M. S. DOLLAR COMPANY, LIMITED, Victoria, British Columbia,

Appellant,

ROBERT DOLLAR, President,

Representative of the said Company.

GENZO AKIHAMA, Advocate,

Attorney for the Appellant.

Having investigated the matter of the capture of a British steamer "M. S. Dollar," this Court decides:

SENTENCE.

The Capture of the "M. S. Dollar," British steamer, is valid.

FACTS AND REASONS.

The said "M. S. Dollar" is owned by the appellant company, and is a merchant vessel under the British flag and registered at the Port of Victoria, British Columbia. Under the charter-party dated San Francisco, the 8th of December, 1904, between M. S. DOLLAR STEAMSHIP COMPANY, agents of the appellant company, and HARRY J. HART, of San Francisco, the steamer left San Francisco on the 31st of the same, loading aboard her about 26,200 bales of hay, about 14,600 sacks of barley and 32,200 sacks of oats for the purpose of transporting them to Vladivostock, Russia. In the ship's papers the port of arrival is Moji, and the bill of lading is to order or his assigns. The steamer passing through the Muchi Channel, Korrile Islands, sailed toward the La Perouse Strait, but was prevented to pass the strait from floating ice. Thereby the steamer navigating southward passed Iturup Channel and was going toward Vladivostock via. the Tsuruga Strait. However, in her log-book, journal and chief engineer's log-book her route is concealed and shown as if she took the direct course from San Francisco to the Tsuruga Strait. On the 27th day of January, 1905, the steamer was, while in the act of passing through the said strait, captured near Ryuhizaki Promotory by the "ASAMA," of our Imperial Navy.

The above facts are well corroborated by the statement made by the 1st Lt. Ogura, acting Captain of the "ASAMA," the examinations of Charles Cross, Master of "M. S. DOLLAR," the crew of the said steamer, Edward Clarence Davies and R. Stanley Dollar, and from the ship's certificate of nationality, charter-party, bill of lading, cargo inventory, clearance certificate from San Francisco, bill of health, log-book, journal, chief engineer's log-book, genuine journal produced from the Master after his confession and the statement made by the appellant's attorney.

The essential points raised by the appellant are:—

The appellant allowed the charterer to engage in the transportation of goods from San Francisco to Moji. The attempt to sail to ports other than the port designated in the charter-party was the act of the charterer and the ship-owner had nothing to do with the act. Moreover, her cargo does not belong to the ship-owner, and therefore, even if the cargo be a contraband of war, the ship should not share condemnation. If it happened that Vladivostock was not described in her ship's papers as a port of call, it is simply a defect in the papers, but cannot be deemed false means of evading capture. Even admitting for a moment that such was a means of smuggling, it was the act of the charterer for the purpose of evading capture of his goods, and so long as the ship-owner did not participate in the act, the ship should not suffer its consequence. Moreover, the said cargo does not belong to that class of goods that is absolutely contraband of war, and therefore it

is clear from the case of the "Neptune," captured in the war of 1798 between Great Britain and Holland, that when, as in the present case, such cargo was destined for such a port as Vladivostock, which is a naval as well as commercial port, it is proper, so far as there is no contrary evidence, to admit that the cargo was destined for the said Vladivostock as a commercial port. Besides the said cargo is not from its nature limited to military or naval use. The appellant asked for the release of the said ship on these grounds.

This Court considers that Vladivostock is not only a very important Russian naval port and base of her squadron in the East, but since the Russo-Japanese War it is a basis of military supplies, and the Russian Government has collected there as much military and naval provisions as possible. It is clearly known that ordinary traffic to that port has almost stopped. Therefore so long as there is no clear evidence to prove to the contrary, it is proper to consider the said cargo a part of such provisions, because hay, etc., which are occasionally contraband of war, may according to circumstances such as their destination to Vladivostock, be deemed contraband of war. In the case of the "Neptune" referred to by the appellant's attorney, animal fat was intended to be carried to Amsterdam and therefore such case does not apply to the present case. Not only so, but the grounds of the judgment in the said case even support the argument that the cargo in the present case is a contraband of war, because Amsterdam was at that time chiefly a commercial port, and very

different from the present condition of Vladivostock, but Brest, mentioned in that judgment, was very similar to the present state of Vladivostock. From the quantity of the cargo, false means of the transportation and the statement of her Master, there is no doubt that it was destined for the enemy's army, and it was therefore proper to deem it a contraband of war. While it is clear from the examinations of her Master and crew and others, that the ship's destination was Vladivostock, and while in the genuine journal it was minutely entered to the effect that as the course of the steamer was on the 23d January prevented at the point northward of Kunashiri Island from floating ice she turned her way, and other true entries since then, the port of arrival mentioned in the ship's papers produced at the time of her capture in Moji and in the log-book, journal and chief engineer's log-book, her true course is concealed and shown as if she took a direct course from San Francisco to the Tsuruga Strait. At the time of search by the Acting Captain of the "ASAMA," as well as at the time of examination by the Judge in charge, the Master and crew did fail to make straight answer. After several examinations they at last confessed the truth, and these circumstances are enough to recognize the fact that the evasion from capture by false means had very carefully been prepared. In short, the said S. S. "M. S. Dollar" did engage in the transportation of a contraband of war by false means. In such cases it is a recognized doctrine and usage of the International Law that such ship shall be condemned together with such contraband of war whether the

shipowner did participate in the act or not. For these reasons the said steamer shall be condemned, and therefore it is not necessary to discuss other points raised by the appellant.

Therefore the above sentence is hereby given.

Given at the YOKOSUKA PRIZE COURT in the presence of Inspector KOBAYASHI YOSHIRO, on the 28th April, 1905.

Presiding Judge, TAKASHI HASEWAGA.
Associate " KISABURO SUZUKI.
" " CHUKI SHIM-OKA.
" " TETSUKICHI KURACHI.
" " MICHIZO TOKUDA.
Court Clerk, KAZUYOSHI MOROHASHI.
Court Seal.

Receipt of a copy of the within Answer is hereby admitted this 29th day of March, 1907.

FRANK & MANSFIELD,
Attorneys for Plaintiff.

[Endorsed]: Filed March 29, 1907. Southard Hoffman, Clerk.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),
Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),
Defendant.

Amended Complaint [Filed October 23, 1907].

Now comes the plaintiff above named, and by stipulation of the parties and leave of Court first had and obtained, files this its amended complaint in the above-entitled action, and for cause of action against said defendant, alleges:

I.

That at all the times hereinafter mentioned, the said plaintiff was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

II.

That at all the times hereinafter mentioned, the defendant was, and still is, a corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, having its principal place of business in the City of London, England, having an agency and place of business in the City and County of San Francisco, State of California, and at all of said times said defendant was, and still is, a citizen and subject of said United Kingdom of Great Britain and Ireland.

III.

That on the 22d day of December, 1904, the said defendant Maritime Insurance Company, Limited, for a good and valuable consideration, issued to said plaintiff its policy of insurance (a copy of which is

hereto attached marked Exhibit "A" and hereby expressly referred to and made a part hereof), wherein and whereby said defendant did insure the said plaintiff M. S. Dollar Steamship Co., as well in their own name as for and in the name and names of every other person or persons to whom the subject matter of said policy does, may, or shall appertain in part or in all, upon the hull, materials, machinery and boilers and everything connected therewith, of the ship or vessel called the "M. S. Dollar," in the sum of Three Thousand Pounds (£3,000) in the money of the United Kingdom of Great Britain and Ireland, then and there being equivalent to Fourteen Thousand Five Hundred and Eighty (14,580) Dollars United States Gold Coin.

That the said insurance was an insurance lost or not lost at and from San Francisco to Vladivostock, while there, and thence back to a safe neutral port, warranted to clear on or before January 31st, 1905, or held covered at premium to be arranged.

IV.

That the said policy so issued as aforesaid, is an usual form of marine policy, containing the warranted free of capture, seizure and detention clause as follows:

"Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, either before or after declaration of war."

That in said policy the said clause and warranty so referred to as aforesaid, is canceled, and the said policy in and by its terms expressly covers the risks in said clause mentioned, and the said steamer was then and there by the terms of said policy, insured against the risk of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, hostilities or warlike operations, either before or after declaration of war, and with liberty to run blockades.

V.

That on the 31st day of December, 1904, the said steamer "M. S. Dollar" cleared and departed from said port of San Francisco on a voyage to Vladivostock, Siberia, and continued on said voyage and was so duly prosecuting the same at the time of her capture as hereinafter set forth.

VI.

That on the ——day of February, 1904, War was declared by the Empire of Japan against the Empire of Russia, and hostilities existed and warlike operations were at all times herein mentioned being conducted between the said Empire of Japan and said Empire of Russia.

VII.

That thereafter the said vessel proceeded on her said voyage until she arrived at a point off of the Island of Yezo near the Straits of Tsugaru, at which place the said vessel was seized, captured and detained on the 26th day of January, 1905, by a Japanese man-of-war acting under and by authority

of the Emperor of Japan, which said seizure was then and there duly authorized by and in the prosecution of hostilities between said Empire of Japan and said Empire of Russia, and thereafter, to wit, on the —— day of ————, 1905, said vessel was condemned and then and there by said belligerent confiscated.

VIII.

That before the time of effecting the said insurance this plaintiff had purchased said steamer "M. S. Dollar," and had paid the purchase price thereof, and thereafter, and before the effecting of said insurance had caused the legal title to said vessel to be conveyed to the M. S. Dollar Company, Limited, a corporation, organized under the laws of the Dominion of Canada, with its principal place of business at Victoria, in the Province of British Columbia, upon the consideration that it, the said M. S. Dollar Company Limited, would hold said legal title in trust for this plaintiff, and that said plaintiff should have the beneficial interest in said vessel, with full control and power to use and dispose of her.

That in pursuance of said agreement, said plaintiff was on the 29th day of October, 1903, appointed by said M. S. Dollar Company, Limited, the managing agent of said steamer "M. S. Dollar," with full power and authority to perform every act in respect to said vessel that the said M. S. Dollar Company, Limited, could do.

That at the time of effecting the said insurance and at the time of the loss herein alleged, and at all

times in this complaint mentioned, said steamer "M. S. Dollar" was owned, held and operated under and in accordance with the aforesaid arrangement.

That the said plaintiff effected the said insurance on its own account and as agent for said M. S. Dollar Company, Limited, and for the purpose and with the intent then and there of covering the said interest of said plaintiff and the interest as aforesaid of said M. S. Dollar Company, Limited.

IX.

That by reason of such seizure, capture and detention, and as a consequence thereof, the said steamer then and there became and was a total loss by the perils in said policy insured against.

X.

That thereafter, and upon the first day of February, 1905, and before the commencement of this action, the said plaintiff duly abandoned the said vessel to said defendant.

XI.

That after the said seizure, capture and detention aforesaid, and more than sixty days before the commencement of this action, the said plaintiff furnished said defendant with due and proper proofs of loss and interest in said property, and otherwise performed all the covenants and conditions in said contract of insurance on its part to be performed.

XII.

That the said plaintiff has, by reason of the said seizure, capture and detention of said vessel as aforesaid, and by reason of the loss of said vessel by said perils insured against suffered loss and

damage in the sum of Fourteen Thousand Five Hundred and Eighty ($14,580) Dollars.

XIII.

That thereafter the said plaintiff demanded payment of the said defendant of the said sum, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part thereof has been paid.

Wherefore, said plaintiff prays for judgment against said defendant for said sum of Fourteen Thousand Five Hundred and Eighty ($14,580) Dollars, together with interest thereon from said first day of February, 1905, and its costs herein.

FRANK and MANSFIELD,
Attorneys for Plaintiff.

Exhibit "A" [to Amended Complaint Filed October 23, 1907].

HULL.

Directors:
Edward H. Cookson, Chairman.
J. F. Caroe, Deputy Chairman.
Arthur W. Bibby.
J. Kirke Crooks.
Rowland E. L. Naylor.
William S. Patterson.
Joshua Sing.

HEAD OFFICE:
Liverpool,
Brown's Building.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's, Castle St. Branch.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicholson,

7/6

MARITIME INSURANCE COMPANY Limited

London Agency.

London Agency:
80 Cornhill, E. C.

Agent:
William Armit.

Bankers:
Robarts, Lubbock & Co.

No. 40/37804 L'pool A/c £ 3000.

The risk not to commence before the expiration of the previous policies.

~~General Average payable as per Foreign~~ Custom, or per York-Antwerp Rules, ~~if in~~ accordance with the contract of affreightment.

W. ARMIT.

Stet. but so far as war risk is concerned only

The Warranty and Conditions as to average under three per cent to be applicable to each Voyage, as if separately insured, and ~~not to the whole time thereon.~~

In the event of the Vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and or dry Dock or Docks during the currency of thia Policy.

(Stamp)

WHEREAS it hath been proposed to the MARITIME INSURANCE COMPANY, LIMITED by M. S. Dollar Steamship Co. as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this policy promising to pay the said company the sum of seven hundred and eighty seven pounds 10/-- as a premium at and after the rate of Twenty-five guineas per Cent. for such insurance the said Company takes upon itself the burthen of such Insurance to the amount of Three Thousand pounds, and promises and agrees with the Insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said insurance shall be and is an Insurance (lost or not lost) at and from SAN FRANCISCO to VLADIVOSTOCK, while there and thence back to a safe neutral port.

To return £5 per cent for loading on or before 31st December 1904.

To return £5 per cent for no claim under this policy.

Warranted to clear on or before 31st January 1905 or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the Warranted free of capture seizure & detention clause in Marine policy or policies.

With liberty to run blockade.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows:

Valued at £

On HULL AND MATERIALS,

Valued at.....£———

MACHINERY AND BOILERS

Valued at.....£———

& everything connected therewith £37050

of the Ship or Vessel called the "M. S. Dollar" whereof ..... is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of .... after such mooring, or until sailing on next voyage whichever may first occur. AND that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. ~~And touching the adventures and perils which the said~~ Company is contented to bear and does take upon itself in the Voyage so insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Countermarts Surprisals Takings at Sea Arrests ~~Restraints and Detainments of all Kings Princes and~~

~~People of what Nation Condition or Quality soever~~ Barratry of the Master and Mariners ~~and of~~ all other Perils Losses and Misfortunes ~~that~~ have or shall come to the Hurt ~~Detriment~~ or Damage of the aforesaid ~~subject matter of this Insurance or any part thereof.~~ AND in case of any Loss or Misfortune is shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the ~~charges whereof the said Company will bear in proportion to the sum hereby Insured.~~ And it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the property Insured shall not be considered a waiver or acceptance of abandonment. ~~AND it is further~~ agreed, that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Insured shall in consequence thereof become liable to pay and shall pay to the persons interested in such other Ship or Vessel or in the freight thereof or in the goods or effects on board thereof any sum or sums of money not exceeding the value of the Ship hereby insured calculated at the rate of eight pounds per ton or her registered tonnage this Company will pay the Insured such proportion of three-fourths of the sum so paid as the sum hereby Insured bears to the value of the ship hereby Insured calculated at the rate of eight pounds per ton or if the value hereby declared amounts to a larger sum then to such declared value ~~and in cases where the liability of the~~

~~Ship has been contested without consent in writing~~ this Company will also pay a like proportion of three-fourth part of the costs thereby incurred or paid provided also that this clause shall in no case extend to any sum which the Insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever. AND it is declared and agreed that the Ship shall be and is warranted free from average under Three ~~Pounds per centum unless general of the ship be stranded sunk or burnt~~.

~~Warranted free of capture seizure and detention~~ and the consequences thereof or of any attempt thereat piracy excepted, and also from all consequences of riots, insurrections, hostilities, or war-~~like operations whether before or after declaration of war~~.

IN WITNESS WHEREOF the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto set their hands in LONDON, the twenty-second day of December, 1904.

W. ARMIT, Agent in London.

Examined W. ARMIT.

Endorsed:

88564

No. 40/37804 L'pool A/c.

It is requested that in case of damage which may involve a claim under this policy, notice, when practicable, be given to Underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.

MARATIME INSURANCE COMPANY, LIMITED, Liverpool.

London 22/12 1904.

(Registered for Enclosure to Robert Dollar Co., from C. T. Bowring & Co. (Insurance) Limited, London.)

Assured—M. S. Dollar S. S. Co. Ld.

Ship—M. S. Dollar.

Voyage—Frisco to Vladivostock

On Hull

£3000 at 25 gs. per cent.

NOTICE.—The Insured are particularly requested to read their Policies.

~~Pay to the order of C. T. Bowring & Co. Insurance, Ltd.~~

~~M. S. DOLLAR STEAMSHIP CO.,~~

~~By ROBERT DOLLAR, Pres.~~

Claimed hereon December sailing

£3000 at 5%	£150.00
10%	15.00
	£135.00

Settled 5 May /05

MARITIME INSURANCE CO., LTD.

A. ARMIT, London.

State of California,

City and County of San Francisco,—ss.

Robert Dollar, being first duly sworn, deposes and says: That at all the times in the foregoing Amended Complaint mentioned he was, and still is, an officer of the Corporation plaintiff herein, to wit, the

President thereof; that he has read the foregoing Amended Complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

ROBERT DOLLAR.

Subscribed and sworn to before me this 23d day of October, 1907.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 9, 1910.

Receipt of a copy of the within is hereby admitted this 23d day of October, 1907.

T. C. VAN NESS,
WILLIAM DENMAN,
Attorneys for Defendant.

[Endorsed]: Filed October 23, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Demurrer to Third Amended Complaint.

Now comes the defendant, and demurring to the third amended complaint on file herein, for cause of demurrer avers:

I.

That the third amended complaint fails to state facts sufficient to constitute a cause of action.

II.

That the said third amended complaint is unintelligible and uncertain, and each of them, because it cannot be determined therefrom who owned the steamer "M. S. Dollar" at the time of effecting the said insurance and at the time of the loss sued for, or that plaintiff had an insurable interest in her at said times, there being no direct allegation as to the ownership at said times or what was done or who owned the vessel after the plaintiff purchased her, which is alleged to be before the time of effecting the insurance.

The allegation that the plaintiff (line 11, paragraph 8) "had caused the legal title to the said vessel to be conveyed to the M. S. Dollar Company, Limited," being a mere conclusion of law, it is unintelligible and uncertain and each of them what, if any, insurable interest the plaintiff had.

The averment that this conveyance was (lines 15 to 19) "upon the consideration that the said M. S. Dollar Company, Limited, would hold said legal title in trust for this plaintiff, and that said plaintiff should have the beneficial interest in said vessel with

full control and power to use and dispose of her" being a mere conclusion of law, and there being no allegation that the M. S. Dollar Company, Limited, accepted the said trust or agreed to perform said consideration, it is unintelligible and uncertain and each of them what, if any, insurable interest the plaintiff had at the time of effecting the insurance and at the time of the loss. The allegation that the steamer was (lines 28 to 30) "owned, held and operated under and in accordance with the aforesaid arrangement" being a mere conclusion of law, it is unintelligible and uncertain and each of them who owned the said vessel at the time of effecting the said insurance and at the time of the loss.

It appearing that the plaintiff (lines 18 and 19) had "power to use and dispose of her" and that the vessel (lines 28 to 30) "was owned—in accordance with the aforesaid arrangement," it is unintelligible and uncertain, and each of them, whether the vessel was owned at the time of effecting the insurance and at the time of the loss, by the plaintiff or by some person to whom the plaintiff had transferred her under its power of disposition.

III.

That the said third amended complaint is unintelligible and uncertain and ambiguous and each of them in this: that it cannot be ascertained therefrom what the risks are referred to as covered by the insurance mentioned in paragraph next to the last on the 1st page of the exhibit attached to the said third amended complaint.

IV.

That the said third amended complaint is unintelligible, uncertain and ambiguous, and each of them, in this: that it cannot be ascertained therefrom what the clause is which is referred to as the "capture, seizure and detention clause" in the paragraph of the exhibit attached to the said third amended complaint, last described.

V.

That the said third amended complaint is unintelligible, uncertain and ambiguous, and each of them, in this: that it cannot be ascertained therefrom what the "marine policy or policies" are which are referred to in the said paragraph of the exhibit herein above described.

VI.

That the said complaint is unintelligible and uncertain, and each of them, in this: that the written contract set out and relied upon insures against risks excluded by a certain clause "in marine policy or policies," while in paragraph IV of the said third amended complaint the insurance is described as against risks excluded by a certain clause in an "usual form" of insurance policy. There is no allegation that the other "policy or policies" are in the "usual form," if there be such a form, and it cannot be determined whether plaintiff relies upon the risks excluded from some "usual form" of policy or from the other "marine policy or policies" referred to in the instrument exhibited.

VII.

That the said third amended complaint is unin-

telligible and uncertain, and each of them, in this: that it cannot be determined therefrom whether the clause alleged in paragraph IV thereof to have been canceled, was canceled before or after the execution of the instrument.

VIII.

That the said third amended complaint is unintelligible and uncertain, and each of them, in this: that it cannot be determined therefrom (a) by what court, if any, the condemnation or confiscation mentioned in paragraph VII of said third amended complaint was decreed, if at all, (b) what decree, if any, was rendered by said court, (c) what the facts were that duly authorized the seizure mentioned in said paragraph.

Wherefore, defendant prays that plaintiff, take nothing by its third amended complaint and that it be hence dismissed with its costs.

T. C. VAN NESS,
WILLIAM DENMAN,
Attorneys for Defendant.

Receipt of a copy of the within Demurrer to Third Amended Complaint is hereby admitted this 1st day of November, 1907.

FRANK and MANSFIELD,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 2d, 1907. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1907, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 18th day of November, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,835.

M. S. DOLLAR S. S. CO.

vs.

MARITIME INSURANCE COMPANY.

Order Overruling Demurrer to Third Amended Complaint.

Defendant's demurrer to the third amended complaint herein, heretofore heard and submitted to the Court for consideration and decision, being now fully considered, it is ordered, in accordance with the oral opinion of the Court, that the said demurrer to the 3d amended complaint be and the same hereby is overruled.

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Answer to Third Amended Complaint.

Now comes the defendant above named, and answering the third amended complaint on file herein, for its defense denies, admits and alleges as follows:

I.

Denies that at any time in the said third amended complaint mentioned the defendant had an agency or any agent in the City and County of San Francisco, State of California, or in the State of California, with any power or authority to take any action whatsoever with reference to the contract of insurance alleged in the said amended complaint to have been executed by the said defendant on the 22d day of December, 1904.

II.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said

third amended complaint annexed, marked Exhibit "A," and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment written form of the written proposal of plaintiff so accepted by defendant.

III.

Denies that the policy of insurance described in the said third amended complaint is an usual form of marine policy. Denies that the said policy contains, or at any time contained, any warranted free of capture, seizure and detention clause. Denies that the said policy contains, or contained, a warranted free of capture, seizure and detention clause as follows:

Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, either before or after declaration of war or at all. Denies that the said policy in all of its terms, or at all, or expressly, or at all, covers the risks in said clause mentioned. Denies that the said steamer "M. S. Dollar" was by the terms of the said

policy insured against the risk of capture, seizure and detention, or capture or seizure or detention, or the consequences thereof. Admits that the said steamer "M. S. Dollar" in the said amended complaint described was at liberty to run blockades.

IV.

Denies that on the 31st day of December, 1904, or at any time in the said third amended complaint mentioned, or at all, the said steamer "M. S. Dollar" cleared on a voyage to Vladivostock, Siberia, or cleared and departed or departed on said voyage.

V.

Answering paragraph VI on page 3 of said third amended complaint, defendant alleges that it has no information or belief upon the subject of the declaration of war by the Empire of Japan against the Empire of Russia and the existence of hostilities and warlike operations between said Empire of Japan and the said Empire of Russia sufficient to enable it to answer the allegations of the said paragraph of said third amended complaint on that behalf, and placing its denial on that ground denies that on the —— day of ————, 1904, or at any time, war was declared by the Empire of Japan against the Empire of Russia, but admits that hostilities existed and warlike operations were at the times mentioned in the said third amended complaint being conducted between the said Empire of Japan and the said Empire of Russia.

VI.

Answering paragraph VII of said third amended complaint, defendant has no information or belief

upon the subject sufficient to enable it to answer, deny or admit the allegation that the vessel proceeded, or that she was seized or captured by a Japanese man-of-war acting under or by the authority of the Emperor of Japan, or at all, on said voyage, or that said seizure was then and there duly authorized by and in the prosecution of hostilities between the said Empire of Japan and the said Empire of Russia, and placing its denial on the said ground denies that the said "M. S. Dollar" proceeded on said voyage insured against until she arrived off the Island of Yezo near the Straits of Tsuruga; denies that on said voyage the said vessel was seized and captured or seized or captured, by a Japanese man-of-war acting under and by the authority of the Emperor of Japan, or otherwise than as in the Third Separate Defense hereinafter set forth, or at all, but admits that she was temporarily detained and that said detention was then and there duly authorized by, or in the prosecution of hostilities between the Empire of Japan and the Empire of Russia; denies that the said vessel was condemned and confiscated, or condemned or confiscated as in said paragraph VII set forth, or at all, save as hereinafter set forth in the Third Separate Defense herein, and in that behalf alleges that said detention was caused solely by the act of plaintiff in carrying said papers on said vessel and in presenting to said officer of said cruiser "Asama" said false and simulated papers, as in said Third Separate Defense described.

VII.

Defendant is informed and believes, that it is not

true and upon its information and belief denies that before the time of effecting the said insurance the plaintiff had caused the legal title to the steamer "M. S. Dollar" to be conveyed to the M. S. Dollar Company Limited, upon the consideration that it, the M. S. Dollar Company Limited, would hold said legal title in trust for this plaintiff, and that, or that said plaintiff should have the beneficial interests in said vessel with full power and control, or power or control, to use and dispose, or use or dispose, of her, or at all; that at the time of effecting said insurance, or at the time of loss herein mentioned, or at all times in this complaint mentioned, or any of said times, the said steamer "M. S. Dollar" was held, owned and operated, or held or owned or operated, under and in accordance with the aforesaid arrangement.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegation contained in the second paragraph of paragraph VIII of said third amended complaint, and placing its denial on that ground, denies that, in pursuance of said agreement, the said plaintiff was, on the 29th day of October, 1903, or at any time, appointed by the M. S. Dollar Company Limited the managing agent of the said steamer "M. S. Dollar," with full power and authority, or power or authority, or any such, to perform every or any act in respect to said vessel that the said M. S. Dollar Company Limited could do.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegation set forth in the four paragraph of paragraph VIII of said third amended complaint, and placing its

denial on said ground, denies that the said plaintiff effected the said insurance on its own account and as agent for the said M. S. Dollar Company, Limited; or on its own account or as agent for said company, and for the purpose and with the intent or for the purpose or with the intent, then and there, or at all, of covering said interest of the said plaintiff, or the interest of the said M. S. Dollar Company, Limited.

VIII.

Answering paragraph IX of said third amended complaint, defendant has no information or belief upon the subject sufficient to enable it to answer the allegations thereof, and placing its denial on that ground, denies that by reason of any capture, seizure, and detention, or capture or seizure or detention, and as a consequence thereof, or as a consequence thereof, the said steamer "M. S. Dollar" then and there, or at all, became and was, or became or was, a total, or any, loss, by the perils in said policy insured against.

IX.

Answering paragraph XI of said third amended complaint, defendant has no information or belief upon the subject of the allegations of the said paragraph sufficient to enable it to answer the said allegations, and placing its denial on said ground denies that after the said seizure, capture and detention aforesaid, and more than sixty (60) days before the commencement of this action, or at all, the plaintiff furnished the said defendant with due and proper, or any, proofs of loss and interest, or loss

or interest, in the said property; denies that at said times, or at all, plaintiff performed all or any of the covenants and conditions, or covenants or conditions, in the said contract of insurance on its part to be performed.

X.

Answering paragraph XII of said third amended complaint, defendant has no information or belief upon the subject sufficient to enable it to answer the allegations thereof, and placing its denial upon the said ground, denies that the plaintiff has, by reason of the said seizure, capture and detention, in said amended complaint described, or seizure or capture or detention, and by reason of the loss of the said vessel by said, or any perils insured against, or by reason of any loss of the said vessel, suffered loss and damage, or loss or damage, in the sum of Fourteen Thousand Five Hundred Eighty (14,580) Dollars, or any sum whatsoever.

SECOND DEFENSE.

And now comes the defendant, and further answering said third amended complaint, and for a defense thereto, admits, alleges, and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A," and thereby expressly referred to and made a part thereof, or any policy of insurance, save and

except its certain policy of insurance, a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Alleges that defendant is informed and believes, and upon its information and belief alleges as follows: That the law of Great Britain at all the times in said third amended complaint mentioned was that an insured person should not conceal from his insurer on a marine risk any facts, which is known to the insurer might prevent him from undertaking the risk, and that a concealment of such facts avoided a policy of insurance given by such insurer to such person; that at the time of making said policy the plaintiff well knew that all of the cargo of said M. S. Dollar Steamship Company consisted of provisions and fodder destined for Vladivostock, a locality in Russian territory, of such a nature that the said cargo might have been considered to be intended for the Russian Army or Navy; that defendant is informed and believes, and upon such information and belief alleges that prior to the 1st day of December, 1905, to wit, on the 10th day of February,

1904, the Emperor of Japan, through his agent, Baron Gombei Yamamota, Minister of State for the Navy, by his order duly given and made, did declare said cargo so destined to be contraband of war; that a copy of said order is more particularly set forth in Exhibit "C," hereunto annexed and made a part hereof. That the said policy contemplated the war risk of running a blockade, if a blockade were declared on the port of Vladivostock before said voyage in said third amended complaint described was terminated, and did not contemplate a risk of condemnation for carrying contraband of war with false papers. That defendant is informed and believes, and upon its information and belief, alleges that at the time of the issuance of the said policy no such blockade had been declared, and that said policy was against the risk of capture, seizure and detention in running such blockade, if declared. That defendant is informed and believes, and upon such information and belief alleges that plaintiff, at the time of the delivery of the policy of insurance sued upon, well knew that said voyage was to be falsely described in the ship's charter-party, copies of bills of lading, log-book, engineer's log-book, journal, clearance certificate, bill of health and other ship's papers, as to Moji, in Japan, whereas in truth and in fact the said ship at no time intended to sail to Moji, Japan, but at all times intended to sail to Vladivostock, Russia; that plaintiff then well knew that said cargo was in said documents to be described as destined for Moji, Japan, whereas in truth and in fact none of said cargo was destined for Moji, Japan,

but all of the said cargo of the said vessel was destined for Vladivostock, Russia. That plaintiff at no time communicated to defendant the said intention regarding the said documents of the said ship, but at all times concealed the same from defendant, and that defendant at no time knew of the said false documents or of the intended use of the same, until long after the termination of the said voyage; that the said loss of the said "M. S. Dollar," if the said vessel were lost, by capture, seizure and detention, or capture or seizure or detention, or the consequences thereof, was by reason of the carriage of the aforementioned cargo and the false documents aforementioned; that if the defendant had known of the intent to use said false documents, it might have prevented it from executing the said policy so sued upon; that the said use of the said false documents to conceal the destination of the said cargo as aforesaid, and the said carriage of the said cargo materially increased the risk of capture, seizure and detention of the said vessel on the said voyage; that defendant, upon learning of said concealment, tendered to plaintiff all moneys received by it as premium on said policy.

THIRD DEFENSE.

And further answering unto said third amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff

its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A," and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Defendant is informed and believes, and upon such information and belief alleges: That at all times in said third amended complaint mentioned, it was the law of Great Britain that where a policy of insurance insures a vessel carrying contraband cargo against the risk of capture, seizure or detention, in the form of the policy hereunto annnexed, marked Exhibit "A," and made a part hereof, or of the policy set forth in the complaint and the said capture, seizure or detention is caused by the carriage of false or simulated papers, falsely describing her national character, route or destination, or the character or destination of her cargo, and the judgment or decree of the prize tribunal of the nation making the said capture, seizure or detention expressly states as its

ground of condemnation that the vessel carried such papers, and there was no express leave given the insured to carry such papers, although it might be notorious that the trade in which the vessel is engaged could be much more advantageously carried on with such papers, and although it is the custom of the trade and voyage for which the insurance is issued to carry such papers, the underwriter on such policy is nevertheless freed from liability from loss arising from any such capture, seizure or detention.

III.

Defendant is informed and believes, and upon such information and belief alleges as follows: That the said "M. S. Dollar," while near Tsugaru Straits, as described in the said amended complaint, was on the 26th day of January, 1905, temporarily detained by the "Asama," a man-of-war of the Japanese Empire; that the captain of the "Asama" did thereupon demand, in the name of the Emperor of Japan, the "M. S. Dollar's" certificate of nationality, her charter-party under which she was being operated, her bills of lading, her cargo inventory, her clearance certificate from San Francisco, her bill of health, her log-book; that the plaintiff did then and there produce the log-book, the journal and the Chief Engineer's log-book, and did give the same to the Captain of the "Asama"; that the true course of said vessel on said voyage had heretofore been from San Francisco to and through Muchi Channel, by the Koorile Islands, in the direction towards La Perouse Strait, where the ship was prevented from passing through the strait by floating ice; that La Perouse

Strait is a strait on the more northerly course from San Francisco to Vladivostock, and not on any course, but far from any course, from San Francisco to Moji, Japan; that thereafter the said "M. S. Dollar," navigating southward, passed through Iturup Channel and was going toward Vladivostock via Tsuruga Strait; that in her log-book, journal and Chief Engineer's log-book, plaintiff caused the route of the said vessel through the said Muchi Channel, by the Koorile Islands and towards La Perouse Strait, to be concealed and her route to be falsely shown as if she had taken the direct course from San Francisco to Tsuruga Strait; that the copies of the bills of lading kept by plaintiff on said ship gave the destination of her cargo as Moji, Japan, whereas all of said cargo was destined for Vladivostock, in Siberian Russia; that the clearance certificate of the said vessel from San Francisco, gave the destination of the said vessel as Moji, Japan, whereas in truth the destination of the said vessel was Vladivostock, Russia; that the plaintiff gave all such false papers, to wit, the false copies of the bills of lading, false clearance certificate, false log-book, false journal, false engineer's log-book, to the captain of the said "Asama," as aforesaid, representing to him that the said false documents were in fact true and did truly describe the destination of the said cargo, and the said vessel and the course of the said vessel; that the said Captain of the said "Asama" did thereupon cause the said vessel to be taken by the Empire of Japan, and that thereafter the said vessel was condemned by the Yokasuka Prize Court, a court duly

organized and existing under and by virtue of the laws of Japan with jurisdiction in prize cases, by its decree therein duly given and made, a copy whereof is fully set forth and hereunto annexed, marked Exhibit "B" and hereby made a part hereof, as described in the third amended complaint, and that no other condemnation or confiscation of the said vessel was had at any time on the said voyage. That the carrying of said false papers increased the risk of capture, seizure and detention of said vessel on said voyage, and such carrying and such delivery by plaintiff caused the condemnation in said decree set forth. That at no time was any permission given by defendant to plaintiff to carry such papers.

FOURTH DEFENSE.

And further answering said amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A," and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance, a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December,

A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Alleges that the plaintiff impliedly warranted, in the acceptance of the said policy, and the said policy impliedly warranted, that the said "M. S. Dollar," so sailing from San Francisco on the voyage insured against, should be properly documented, i. e., that she should have on board, in proper form, all proper neutrality paper, indicating truly the character of her cargo, her nationality, her destination, and the route at all times pursued thereto.

III.

Defendant is informed and believes, and upon such information and belief, alleges as follows: That at no time on the said voyage did the plaintiff provide the said "M. S. Dollar" with the said proper neutrality papers, but, on the contrary, the said plaintiff provided to the said vessel false and simulated papers, to wit, a false clearance certificate, false charter-party, false copies of bills of lading, false bill of health, false cargo inventory, and false log-books, wherein the destination of the said vessel and the said cargo was described as Moji, in Japan, whereas the truth, and in fact the said cargo and vessel were not destined for Moji, Japan, but were destined for Vladivostock, in Siberian Russia; that the said log-books so supplied by plaintiff falsely described the

voyage in question as heretofore set forth in the Third Defense hereof; that the detention and condemnation and the loss of the said vessel, if any loss there be, were caused solely by plaintiff's falsifications and false pretentions above mentioned.

IV.

That defendant is informed and believes, and upon its information and belief, alleges that the law of Great Britain at all the times in said amended complaint mentioned was: That the insured and policy of marine insurance insuring a vessel against capture, seizure and detention, impliedly warrant the carriage by the vessel of the neutrality papers above described, and it is a further law of Great Britain that a breach of said implied warranty avoids the policy.

V.

Alleges that the carriage of the said false and simulated papers on board the said vessel, and said failure to carry proper neutrality papers on the said vessel, materially increased the risk of the said vessel's capture, seizure and detention on the said voyage, and were the cause of the condemnation of the said vessel, and the cause of the loss of the said vessel, if loss there be; that at no time did defendant grant any permission to carry such, or any, false papers on said voyage.

VI.

That at all the times in the said third amended complaint mentioned, it was the law of Great Britain that where a vessel is condemned for carrying false papers under circumstances which defeat the own-

er's right to recover, the insurer in a policy insuring a vessel against capture, seizure and detention is entitled to retain the premium.

FIFTH DEFENSE.

And further answering unto said third amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A" and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance, a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Defendant is informed and believes, and upon its information and belief alleges as follows: That the law of Great Britain at all the times in said third

amended complaint mentioned was that an insured person should not conceal from his insurer on a marine risk any facts which if known to the insurer might prevent him from undertaking the risk, and that a concealment of such facts avoided a policy of insurance given by such insurer to such persons; and defendant alleges and admits that at all of the times in said complaint mentioned the said Empire of Japan and the said Empire of Russia were engaged in the commission of warlike acts, each against the other, and amongst other acts, as defendant is informed and believes, and upon such information and belief alleges, the cruisers and war vessels of the Empire of Russia were at all said times cruising in and about the water surrounding the Empire of Japan, and that at all of the times subsequent to the 1st day of December, A. D. 1904, and until the condemnation of the said "M. S. Dollar" vessels carrying cargo to Moji or other ports in Japan were liable to the risk of capture, seizure and detention by the said cruisers of the Empire of Russia; that notwithstanding the said danger and the fact that the said cargo and the said vessel were in fact destined for the port of Vladivostock in Russia, the plaintiff furnished and supplied to the said "M. S. Dollar" a charter-party, journal and copies of bills of lading of all cargo carried by her, and log-book, and clearance papers, and Chief Engineer's log-book in which the destination of the said vessel and cargo was described as Moji, Japan; that in addition to the said papers, plaintiff supplied to the "M. S. Dollar" a certain other journal and log-book, in which the said voyage

was properly described, and the various stages thereof properly described from San Francisco to Vladivostock; that the carriage of the said dual set of papers, to wit, the said true and the said false log-book and journal, and the said false copies of bills of lading, clearance papers and charter-party, greatly increased the risk of capture of the said vessel and her seizure and detention and her condemnation by the cruisers of the Russian Navy; that at the time of the issuance of the said policy plaintiff well knew that it intended to supply the said vessel with the said false papers so describing the destination of the vessel and cargo as Moji, Japan, that at no time did it inform defendant of its intention to do so, and that at all times it concealed said intention from the defendant, and that defendant at no time knew said intention until long after the completion of the said voyage; and defendant is further informed and believes, and upon such information and belief alleges, that it was at all the times in said complaint mentioned, the law of Great Britain that any act of any insured person under a policy of marine insurance tending to materially increase the risk of loss under said policy of insurance, avoided the said policy of insurance and relieved the insurer therein from any liability thereupon; that defendant, upon learning of said concealment, tendered to plaintiff all moneys received by it as premium on said policy.

SIXTH DEFENSE.

And further answering said third amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A" and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance, a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Alleges that at no time did the said steamship "M. S. Dollar" clear for Vladivostock, Siberia, as warranted in said policy, or at all; that at no time prior to the loss of the said vessel did the plaintiff notify the defendant that it had so failed to clear its vessel for Vladivostock; and that at no time was any premium or cover arranged between the plaintiff and the defendant.

SEVENTH DEFENSE.

And further answering said third amended complaint, and for a defense thereto, defendant admits, alleges and denies as follows:

I.

Denies that on the 22d day of December, 1904, or at any time, the said defendant, for a good and valuable consideration, or at all, issued to said plaintiff its policy of insurance, a copy of which is unto said third amended complaint annexed, marked Exhibit "A," and thereby expressly referred to and made a part thereof, or any policy of insurance, save and except its certain policy of insurance a copy whereof is hereunto annexed and hereby made a part hereof, being marked Exhibit "A," which said policy of insurance was made, executed and delivered by defendant to plaintiff in London, in the Kingdom of Great Britain, on or about the 24th day of December, A. D. 1904; and defendant alleges that the form of the said policy of insurance was drawn by the plaintiff and submitted to the defendant by plaintiff, and the said policy of insurance so issued was the embodiment in written form of the written proposal of plaintiff so accepted by defendant.

II.

Defendant, upon information and belief, denies that the said steamer "M. S. Dollar" cleared and departed, or cleared or departed, from the port of San Francisco on a voyage to Vladivostock, Siberian Russia, at any time in said complaint mentioned, and alleges that it is informed and believes, and upon that information and belief alleges that instead of sailing for said port, the said vessel cleared and departed from the port of San Francisco on the 31st day of December, 1904, on a voyage to Moji, Japan, the port of nation at war with Russia. That said voyage to

Moji, Japan, was a totally different voyage from that to Vladivostock, Russia, in this: that its terminus is different, and a vessel so destined to Moji was liable to capture, seizure and detention by Russian cruisers cruising off the coast of Japan, as in the fifth defense hereto described.

That said voyage and said risk were a voyage and a risk entirely different from any voyage and risk contemplated by the policy sued upon in said third amended complaint.

That defendant is informed and believes, and upon its information and belief alleges that it was the law of Great Britain at all of the times in said third amended complaint mentioned that where insurance is made in the form of the policy hereunto annexed and marked Exhibit "A" and containing the words, "at and from" the port of San Francisco, and the vessel remains "at" the port of San Francisco for several days after the delivery of the policy, whence it sails on a voyage different from the voyage insured against, the insurer is entitled to retain his premiums against the demand of the insured.

Wherefore, defendant prays for judgment against the plaintiff, and its costs herein.

WILLIAM DENMAN,
T. C. VAN NESS,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

William Denman, being first duly sworn, deposes and says:

That he is one of the attorneys of the Maritime Insurance Company, Limited, the defendant in the above-entitled cause; that he resides and has his office in the City and County of San Francisco, State of California; that the defendant is absent from the said City and County and is a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and that for this reason the verification is not made by the said defendant; that he is informed and believes that all the matters in said answer stated are true; that he has read the said answer and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

WILLIAM DENMAN.

Subscribed and sworn to before me this 10th day of December, 1907.

[Seal] CEDA DE ZALDO,

Notary Public in and for the City and County of San Francisco, State of California.

[Exhibit "A" to Answer to Third Amended Complaint.]

(Stamp 5 shillings) 7/6 (Stamp 2 s 6 d.)

HULL.

MARITIME INSURANCE COMPANY LIMITED

London Agency.

London Agency:
80 Cornhill, E. C.

Agent:
William Armit.

Bankers:
Robarts, Lubbock & Co.

Directors:
Edward H. Cockson
Chairman.

J. F. Caroe,
Deputy Chairman.

Arthur W. Bibby.
J. Kirke Crooks.
Rowland E. L. Naylor.
William S. Patterson.
Josbua Sing.

HEAD OFFICE:
Liverpool,
Brown's Building.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's, Castle St. Branch.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicbolson.

No. 40/37804 L'pool A/c £ 3000.

The risk not to commence before the expiration of the previous policies.

In the event of the Vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and/or dry Dock or Docks during the currency of this policy.

STET. BUT SO FAR AS WAR RISK IS CONCERNED ONLY:

~~General Average payable as per Foreign~~ Custom, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

Tbs Warranty and Conditions as to average nnder three per cent to be applicable to each voyage, as if separately insured, and not to the whole time thereon.

(STAMP)

WHEREAS IT hath been proposed to the MARITIME INSURANCE COMPANY LIMITED by M. S. DOLLAR STEAMSHIP CO. as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay the said Company the sum of seven hundred and eighty seven pounds 10/—as a premium at and after the rate of Twenty-five guineas per Cent. for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Three thousand pounds, and promises and agrees with the Insured their Executors Administrators and Assigns in all respects truly to perform and fulfil the Contract contained in this Policy AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from SAN FRANCISCO to VLADIVOSTOCK, while there and thence back to a safe and neutral port.

To return £5 per cent for loading on or before 31st December 1904.

To return £5 per cent for no claim under this policy.

Warranted to clear on or before 31st January 1905 or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the Warranted free of capture seizure & detention clause in Marine policy or policies.

With liberty to run blockade.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows:

Valued at £

On HULL AND MATERIALS,
Valued at.....£—
MACHINERY AND BOILERS, Valued at.....£—
and everything connected therewith £37050

of the Ship or Vessel called the "M. S. DOLLAR" whereof ..... is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of ..... after such mooring, or until sailing on next voyage whichever may first occur. AND that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defense Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance. AND it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving

or Preserving the property Insured shall not be considered a waiver or acceptance of abandonment.

IN WITNESS WHEREOF the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto set their hands in LONDON, the twenty-second day of December, 1904.

W. ARMIT,
Agent in London.

Examined—W. ARMIT.

Endorsed:

88564

No. 40/37804 L'pool A/c

It is requested that in case of damage which may involve a claim under this policy, notice when practicable, be given to Underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.

MARITIME INSURANCE COMPANY, LIMITED, Liverpool.

London 22/12 1904

Assured—M. S. Dollar S. S. Co. Ld.
Ship—M. S. Dollar
Voyage—Frisco to Vladivostock
On Hull
£3000 at 25 gs. per cent.

NOTICE.—The Insured are particularly requested to read their Policies.

Claimed hereon December Sailing

£3000 at 5%	£150.00
10%	15.00
	£135.00

Settled 5 May/05

MARITIME INSURANCE CO. LTD.

A. ARMIT,

London.

(Registered for Enclosure to Robert Dollar Co. from C. T. Bowring & Co. (Insurance) Limited, London.)

[Exhibit "B" to Answer to Third Amended Complaint.]

YOKOSUKA PRIZE COURT.

JUDGMENT.

The M. S. DOLLAR COMPANY, LIMITED, Victoria, British Columbia,

Appellant,

ROBERT DOLLAR, President, Representative of the Said Company,

GENZO AKIHAMA, Advocate,

Attorney for the Appellant.

Having investigated the matter of the capture of a British steamer "M. S. DOLLAR," this Court decides:

SENTENCE:

The Capture of the "M. S. DOLLAR," British steamer, is valid.

FACTS AND REASONS.

The said "M. S. DOLLAR" is owned by the appellant company, and is a merchant vessel under the

British flag, and registered at the Port Victoria, British Columbia. Under the charter-party, dated San Francisco, the 8th of December, 1904, between M. S. DOLLAR STEAMSHIP COMPANY, agents of the appellant company, and HARRY J. HART, of San Francisco, the steamer left San Francisco on the 31st of the same, loading aboard her about 26,200 bales of hay, about 14,600 sacks of barley and 32,200 sacks of oats for the purpose of transporting them to Vladivostock, Russia. In the ship's papers the port of arrival is Moji, and the bill of lading is to order or his assigns. The steamer passing through the Muchi Channel, Koorile Islands, sailed toward the La Perouse Strait, but was prevented to pass the strait from floating ice. Thereby the steamer navigating southward, passed Iturup Channel and was going toward Vladivostock, via the Tsuruga Strait However, in her log-book, journal and chief engineer's log-book, her route is concealed and shown as if she took the direct course from San Francisco to the Tsuruga Strait. On the 27th day of January, 1905, the steamer was, while in the act of passing through the said strait, captured near Ryuhizaki Promontory by the "ASAMA," of our Imperial Navy.

The above facts are well corroborated by the statement made by the 1st Lt. Ogura, acting Captain of the "ASAMA," the examinations of Charles Cross, Master of "M. S. DOLLAR," the crew of the said steamer, Edward Clarence Davies and R. Stanley Dollar, and from the ship's certificate of nationality, charter-party, bill of lading, cargo inventory, clear-

ance certificate from San Francisco, bill of health, log-book, journal, chief engineer's log-book, genuine journal produced from the Master after his confession and the statement made by the appellant's attorney.

The essential points raised by the appellant are:—

The appellant allowed the charterer to engage in the transportation of goods from San Francisco to Moji. The attempt to sail to ports other than the port designated in the charter-party was the act of the charterer and the ship owner had nothing to do with the act. Moreover, her cargo does not belong to the ship-owner, and therefore, even if the cargo be a contraband of war, the ship should not share condemnation. If it happened that Vladivostock was not described in her ship's papers as a port of call, it is simply a defect in the papers, but cannot be deemed false means of evading capture. Even admitting for a moment that such was a means of smuggling, it was the act of the charterer for the purpose of evading capture of his goods, and so long as the ship owner did not participate in the act, the ship should not suffer its consequence. Moreover, the said cargo does not belong to that class of goods that is absolutely contraband of war, and, therefore, it is clear from the case of the "Neptune," captured in the war 1798, between Great Britain and Holland, that when, as in the present case, such cargo was destined for such a port as Vladivostock, which is a naval as well as a commercial port, it is proper, so far as there is no contrary evidence, to admit that the cargo was destined for the said Vladivostock as

a commercial port. Besides the said cargo is not from its nature limited to military or naval use. The appellant asked for the release of the said ship on these grounds.

This Court considers that Vladivostock is not only a very important Russian naval port and base of her squadron in the East, but since the Russo-Japanese War it is a basis of military supplies, and the Russian Government has collected there as much military and naval provisions as possible. It is clearly known that ordinary traffic to that port has almost stopped. Therefore, so long as there is no clear evidence to prove to the contrary, it is proper to consider the said cargo a part of such provisions, because hay, etc., which are occasionally contraband of war, may according to circumstances, such as their destination to Vladivostock, be deemed contraband of war. In the case of the "Neptune" referred to by the appellant's attorney, animal fat was intended to be carried to Amsterdam, and therefore, such case does not apply to the present case. Not only so, but the grounds of the judgment in the said case even support the argument that the cargo in the present case is a contraband of war, because Amsterdam was at that time chiefly a commercial port, and very different from the present condition of Vladivostock, but Brest, mentioned in that judgment, was very similar to the present state of Vladivostock. From the quantity of the cargo, false means of the transportation and the statement of her Master, there is no doubt that it was destined for the enemy's army,

and it was therefore proper to deem it a contraband of war. While it is clear from the examinations of her Master and crew and others, that the ship's destination was Vladivostock, and while in the genuine journal it was minutely entered to the effect that as the course of the steamer was on the 23d January prevented at the point northward of Kunashiri Island from floating ice she turned her way, and other true entries since then, the port of arrival mentioned in the ship's papers produced at the time of her capture in Moji and in the log-book, journal and chief engineer's log-book, her true course is concealed and shown as if she took a direct course from San Francisco to the Tsuruga Strait. At the time of search by the Acting Captain of the "Asama," as well as at the time of examination by the Judge in charge, the Master and crew did fail to make straight answer. After several examinations they at last confessed the truth, and these circumstances are enough to recognize the fact that the evasion from capture by false means had very carefully been prepared. In short, the said S. S. "M. S. Dollar" did engage in the transportation of a contraband of war by false means. In such cases it is a recognized doctrine and usage of the International Law that such ship shall be condemned together with such contraband of war whether the ship owner did participate in the act or not. For these reasons the said steamer shall be condemned, and therefore it is not necessary to discuss other points raised by the appellant.

Therefore the above sentence is hereby given.

Given at the YOKOSUKA PRIZE COURT in the presence of Inspector KOBAYASHI YOSHIRO, on the 28th April, 1905.

Presiding Judge, TAKASHI HASEGAWA.
Associate Judge, KISABURO SUZUKI.
Associate Judge, CHUKI SHIM-OKA.
Associate Judge, TETSUKICHI KURACHI.
Associate Judge, MICHIZO TOKUDA.
Court Clerk, KAZUYOSHI MOROHASHI.
Court Seal.

[Exhibit "C" to Answer to Third Amended Complaint.]

It is hereby decided that the undermentioned goods shall be regarded as contraband during the present war between Japan and Russia:

1. The following goods shall be treated as contraband of war in case they are going to pass through the enemy's territory or in case they are destined for the enemy's territory or his army or navy: Arms, ammunition, explosives and the raw materials thereof (including lead, salt-petre, etc.) and apparatus for manufacturing them, cement, uniforms and equipment of military and naval men, armour plates, material for the construction and equipment of men-of-war and other ships, and all other goods to be used solely for purposes of war.
2. The following goods shall be treated as contraband of war in case they are destined for the enemy's army or navy, or in case, from the nature of the locality in the enemy's territory to

which they are bound, they may be considered to be intended for the use of the enemy's army or navy: Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, money, gold and silver bullion, and materials for the construction of telegraphs, telephones and railways.

3. Of the goods mentioned in the foregoing two clauses, those which on account of their quality or quantity may be judged to be evidently intended for the use of the ship that carries them shall not be treated as contraband.

BARON GOMBEI YAMAMOTO,
Minister of State for the Navy.

Dated the 10th day of the 2nd month of the 37th year of Meiji (1904). (February 10, 1904.)

Service of the within admitted this 10th day of December, 1907, at 5 P. M.

FRANK and MANSFIELD,
Attorneys for Plff.

[Endorsed]: Filed December 11, 1907. Southard Hoffman, Clerk.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE CO., LTD. (a Corporation),

Defendant.

Affidavit of Robert Dollar Denying Genuineness and Due Execution of Exhibit.

State of California,
City and County of San Francisco,—ss.

Robert Dollar, being first duly sworn, deposes and says: That he is, and at all of the times hereinafter mentioned was, the President of the M. S. Dollar Steamship Co., plaintiff in the above-entitled cause; that he has read the copy of the policy of insurance attached to the Third Amended Complaint in the above-entitled cause and therein referred to as Exhibit "A"; that the said copy, Exhibit "A" above referred to is not a true copy of the said contract as issued by said defendant and received by the said plaintiff, in this: that the said Exhibit "A" referred to does not contain all of the matter contained in the said policy of insurance at the time it was issued by the said defendant and received by the said plaintiff,

but on the contrary is only a partial copy of said policy of insurance.

ROBERT DOLLAR.

Subscribed and sworn to before me this 19th day of December, 1907.

[Seal] CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1910.

[Endorsed]: Filed Dec. 20, 1907. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

At a stated term, to wit, the July term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 23d day of September, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,835.

M. S. DOLLAR S. S. COMPANY

vs.

MARITIME INSURANCE COMPANY.

Order Allowing Amendment of Answer [to Third Amended Complaint].

* * * * * * *

On motion of Mr. Denman, it is ordered that defendant's answer to the third amended complaint

herein be, and the same is hereby, amended as follows, to wit: on line 21, page 10 after the word "vessel" insert the words "carrying contraband cargo"; on line 23 same page, after the word "hereof" insert the words "or of the policy set forth in the complaint," and on line 24 of the same page after the word "carriage" insert the words "by the officers of said vessel."

* * * * * * *

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY LIMITED (a Corporation),

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff, and assess the damages against defendant in the sum of Seventeen Thousand Five Hundred Thirty-eight 67/100 Dollars. $17,538.67.

W. H. CRIM,
Foreman.

[Endorsed]: Filed Sept. 24, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO. (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Judgment.

This cause having come on regularly for trial upon the 17th day of September, 1908, being a day in the July, 1908, Term of said Court before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; N. H. Frank, Esq., appearing as attorney for plaintiff and William Denman, Esq., appearing as attorney for defendant, and the trial having been proceeded with upon the 18th, 22d, 23d and 24th days of September in said year and term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury after due deliberation having returned the following verdict, which was recorded, to wit: "We, the jury, find in favor of the plaintiff and assess the damages against

the defendant in the sum of Seventeen Thousand Five Hundred Thirty-eight and 67/100 Dollars. $17,538.67. (Sgd) W. H. Crim, Foreman,"—and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that M. S. Dollar Steamship Co., a corporation, plaintiff do have and recover of and from Maritime Insurance Company, Limited, a corporation, defendant the sum of Seventeen Thousand Five Hundred Thirty-eight and 67/100 Dollars ($17,538.67), together with its costs in this behalf expended taxed at $————.

Judgment entered September 24, 1908.

SOUTHARD HOFFMAN,
Clerk.

A true copy. Attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed September 24, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP CO.

vs.

MARITIME INSURANCE COMPANY, LTD.

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 24th day of September, 1908.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed September 24, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY (a Corporation),

Defendant.

Bill of Exceptions.

Be it remembered that on Thursday, the 17th day of September, 1908, the above-entitled action came on regularly for trial before the above-entitled court and a jury, the Honorable W. C. Van Fleet presiding, the plaintiff therein being represented by Nathan H. Frank, Esq., and the defendant being represented by William Denman, Esq. Thereupon the following proceedings were taken and had:

Mr. Frank made his opening statement for the plaintiff as follows:

[Opening Statement to the Jury.]

"Gentlemen of the Jury: In order to give you an understanding as to the issues involved here, and also the evidence as it is put in before you, I will state to you somewhat more in detail what the nature of the case is that you are about to try.

"In December, 1904, the plaintiff took out a policy of insurance with the defendant, insuring the

steamer 'M. S. Dollar,' for a voyage from the port of San Francisco to the port of Vladivostock, in Russia, in Siberia—against the risk of capture, seizure and detention, and some other risks of like nature and with liberty to run the blockade.

"Upon that policy the steamer left the port of San Francisco, bound for Vladivostock, but before she reached there, in fact, after she had passed through the Straits of Tsugar, she was overhauled by a Japanese man-of-war and seized, taken into port and such proceedings had that she was finally condemned.

"Demand was made on the insurance company to pay on their policy; they demurred and finally refused to pay.

"In this case they are setting up as a defense, which is practically the only element in the case,—there are some others in the pleadings but we will find out when we come to examine the testimony that they are practically eliminated; the real practical issue before you is this: they say that the law of England is different from the law of the United States in regard to the question that will be submitted to you, and that under the law of England if a vessel proceeds to a port like Vladivostock and uses what are called 'false papers,' that is, if she takes on board papers showing her destination to be some other port rather than the port to which she is really destined, clears for some other port, then the policy is avoided, that they keep the premiums and don't pay. That is practically the issue between us.

"The first question that you will be called upon to determine is, what is the law of England, concern-

ing which evidence will be placed before you. Then the next question is, after determining that, whether or not under that law their contention is correct, that the taking on of what are called false papers or clearing for a false destination avoids the policy.

"In making this statement to you it is not conceded that the law of England would control even if it were different, because there probably will be some testimony to indicate that the law of America rather than the law of England will control.

"All these matters will be submitted to you under proper instruction from the Court.

"I think the statement that I have made to you will thoroughly indicate to your mind the real questions that will finally come before you for your determination."

[Testimony of Robert Dollar, for Plaintiff.]

ROBERT DOLLAR was then called for the plaintiff and sworn, and testified as follows:

I have been President of the plaintiff corporation since it was formed. The real owner of the steamship "M. S. Dollar" is the M. S. Dollar Steamship Company, a corporation existing under the laws of the State of California, the plaintiff in this case. The ship is a British ship. The owner of record is a corporation existing under the laws of British Columbia, the M. S. Dollar Steamship Company, Limited. The owner was formerly the Arab Steamship Company, a British Columbia corporation. The California corporation furnished all the money for the purchase of vessel by the Arab Steamship Company. The stock of the Arab Steamship Company consisted of

(Testimony of Robert Dollar.)

eighteen hundred shares. The California corporation owned seventeen hundred and ninety-five of those shares. Three were held by Directors in British Columbia; one by me, and one by another San Franciscan. The shares held by these directors were endorsed and turned over to the M. S. Dollar Steamship Company of California, and were placed in my safe. A subsequent corporation to take the legal title of the steamer "M. S. Dollar" was formed entitled the M. S. Dollar Steamship Company, Limited, of British Columbia. A transfer was made by a bill of sale from the Arab Steamship Company to the M. S. Dollar Steamship Company, Limited, of British Columbia. That bill of sale was destroyed in my safe in the fire. This document is a certified copy of that bill of sale.

Mr. Frank thereupon offered the document in evidence. It was received and marked "Plaintiff's Exhibit 1," which is hereunto annexed.

Mr. DOLLAR.—(Continuing.) At the time of the issuance of this policy of insurance, the steamship was operated by the San Francisco corporation, who took the profits, stood the expense, made all the contracts in the name of the M. S. Dollar Steamship Company, and operated her as owner under an arrangement whereby all the profits were to go to the California corporation, and the California corporation was to take entire management and control of the ship and the business.

Mr. FRANK (to Capt. Dollar.)—I now show you a document, Mr. Dollar, and ask you to inspect the same and tell us what it is.

(Testimony of Robert Dollar.)

Capt. DOLLAR.—That is a policy of insurance that was issued to us by the Maritime Insurance Company. I identify it particularly by the signature on the back. That is my signature (indicating).

Mr. FRANK.—Q. You received that, did you, Mr. Dollar? That is the policy you received?

A. Yes, sir.

The COURT.—From whom?

A. We got it from our agents, Bowring & Company. It was delivered to us in San Francisco.

Q. Who by?

A. By Bowring & Company, our agents—our London agents.

The COURT.—Mr. Dollar, is this the only policy of insurance you have ever received evidencing the insurance on this ship?

A. That is the only policy, your Honor, and that policy never left our safe until after the ship had been seized, when I endorsed it on the back there, endorsed it and sent it to our London agents for collection.

Mr. DENMAN.—If the Court please, we have set forth our policy in our answer and there has been no affidavit excepting to it, so the state of the pleadings is that our policy as set forth in the answer must be admitted to be the policy in question. The execution of this policy has not been proved. All that he says about it is that he received it from his agents—not from our agents. That is not a proof of delivery.

Mr. FRANK.—In regard to the denial of the due execution of that instrument, if your Honor please,

(Testimony of Robert Dollar.)

if it becomes necessary I have the authorities upon the subject to the effect that that is not necessary in this case. I think there was an affidavit filed with respect to it. However, the record will show that. Here it is, your Honor. It says: "Robert Dollar, being first duly sworn, deposes and says: that he is, and at all of the times hereafter mentioned was, the president of the M. S. Dollar Steamship Co., plaintiff in the above-entitled cause; that he has read the copy of the policy of insurance attached to the third amended complaint in the above-entitled cause"—

Mr. DENMAN.—Attached to the "complaint," Mr. Frank.

Mr. FRANK.—Oh, that is a clerical error, evidently. In referring to it, if your Honor please, it refers to the complaint instead of to the answer. It evidently is an error. Instead of the complaint it should have said "attached to the answer to the third amended complaint."

"Attached to the third amended complaint in the above-entitled cause and therein referred to as Exhibit 'A'; that the said copy, Exhibit 'A' above referred to is not a true copy of the said contract issued by the said defendant and received by said plaintiff, in this: that the said Exhibit 'A' referred to does not contain all of the matter contained in the said policy of insurance at the time it was issued by the said defendant and received by the said plaintiff, but on the contrary is only a partial copy of said policy of insurance."

Mr. Frank thereupon offered the document in evidence, which was accepted in evidence, marked plain-

(Testimony of Robert Dollar.)
tiff's Exhibit "B," hereunto annexed and hereby made a part hereof.

Mr. Frank thereupon read the document to the jury, down to and including the words, "without prejudice to this insurance." Mr. Frank then stated: "Then follows a part that is stricken out."

Mr. DENMAN.—Is it your contention that they are not a part of the policy?

Mr. FRANK.—I am not making any contention. However, if you wish it read, I will read the whole of it. It was out of deference to your own contention that I omitted it. I will go back and read it all. I will read all of them and denote those portions that are deleted out. I think I have a right to read the instrument and tell the jury just what portion is deleted and what portion is not.

The COURT.—The jury has the right to take the instrument and look at it and see it for themselves; that being so, they have a right to have it read, and it should be explained what any deletion, or erasure or anything of that kind means.

Mr. DENMAN.—Well, that is exactly what I desire, your Honor.

Mr. Frank then turned back and read down to the words, "without prejudice to this insurance," and then said, "Now, what I shall read, and until I indicate further, has a red ink mark drawn through it."

Mr. DENMAN.—Now, we object to the reading of the matter succeeding what has been read for the next 10 lines, on the ground that it is stricken from the policy and necessarily is not a part of the instrument.

(Testimony of Robert Dollar.)

I move that the lines commencing "and touching the adventure," and ending with the words "or any part thereof," 10 lines below, shall not be read to the jury because it is not a part of the instrument, on the ground that it is irrelevant and not a part of the instrument.

The COURT.—I disagree with you. I think the whole instrument should be read.

Mr. DENMAN.—I understand, then, that your Honor overrules the objection.

The COURT.—Yes.

Mr. DENMAN.—I note an exception.

Mr. Frank continued to read the policy down to and through the words, "a waiver or acceptance of abandonment," at the same time indicating to the jury in each case those portions of the policy which were stricken out by a line drawn through them, and those portions of the policy which were not so stricken out but remained on the face of the policy, and proceeded: "Then this part was stricken out. And it is further agreed"—

Mr. DENMAN.—One moment: The same objection to the reading of the remainder of that paragraph beginning with the words, "and it is further agreed," and ending with the phrase, "declaration of war," being all the remainder of the policy pleaded, down to the last paragraph.

The COURT.—The same ruling.

Mr. DENMAN.—Note an exception.

Mr. Frank then continued the reading of the policy to the end, including the endorsements both

on the back and on the margins of the said policy, always indicating the portions deleted.

Mr. Dollar then continued to testify as follows: The "M. S. Dollar" departed from the port of San Francisco on the last day of December, 1904. She was going to Vladivostok, and I cleared her for Moji. After I received news of the seizure of the "Dollar" by the Japanese I notified all the companies. There were a great many companies that had risks on her, and I notified them all. Subsequently I went personally to London, and interviewed the agents there of the Maritime Insurance Company. The agent of Bowring & Company, Mr. Hargreaves went with me. He took the policy along. I asked the agents if they were prepared to pay. I understood from him previous to going there that they had refused, and he thought it would be better for me to go and see them myself. The agent of the Maritime Insurance Company—I forget his name—said, "We will not pay that policy." The agents of the Maritime Insurance Company said they would not pay because I had not produced proofs of loss. I said to him, "All the other insurance companies have paid, and I don't see why you should require that." He said that their company did not go by any others, and that they had to have the proofs of loss. I asked him what they required. He said he required the captain's protest. I said, "That will be easy to get, it is on the way coming now." He said he would require a certified copy of the award of the Prize Court of Yokosuka. I said to him that that was ask-

(Testimony of Robert Dollar.)

ing an impossibility, as I understood it. I had tried to get it, and our agent, Samuel Samuels & Co., Yokohama, reported to us that on account of probable international difficulties the Court had refused to give any certified copy of their award. However, I cabled that day to Samuel Samuels, and in the course of time we got that certified copy of the award, and also the captain's protest, which we sent on to London. That is all that occurred at that time. He said that they would not pay until they got them. I had this policy with me at that time. It had been forwarded on. When the loss occurred I endorsed all the policies—a big bunch of them—as that one is on the back, and sent them on to London for collection, and they had all been paid but this one, and we took this along when we went to see the agents of the Maritime Insurance Company. They never paid anything. They offered to give us back part of the premium, or something like that. At the time this policy was taken out, Vladivostock was blockaded and mined. The Russians had mined it, and the Japanese were blockading it on the outside.

Mr. FRANK.—Q. What was the general information upon that subject among merchants, what was the general information among merchants at this port at that time?

A. It was known all over the world that the port was blockaded. It was the common rumor everywhere. We had private advices from Japan that the port was blockaded.

Mr. DENMAN.—We move to strike out the answer on the ground that the evidence is hearsay.

(Testimony of Robert Dollar.)

The COURT.—The motion will be denied.

Mr. DENMAN.—We note an exception. One moment; we move to strike out that portion of the answer which refers to private advice, as being hearsay.

The COURT.—I deny it.

Mr. DENMAN.—An exception to both rulings.

Cross-examination.

Mr. DOLLAR.—(Continuing.) I did not see the instrument executed myself transferring the "M. S. Dollar" from the Arab Steamship Company to the other corporation. I had the instrument in my hands a few days after it was executed. I did not see it executed myself.

Mr. DENMAN.—Now, if the Court please, I move to strike out all the evidence of the transfer of the Arab Steamship Company, on the ground that the testimony is hearsay.

Mr. DOLLAR.—(Continuing.) I was the President of both corporations. When I saw this instrument executed by the Arab Steamship Company, it was signed by its officers in regular form, and the Secretary forwarded them to our office here, stating that they had been duly executed. He enclosed them to us. I did not see them executed because they were executed in British Columbia and I was here in San Francisco.

The COURT.—The motion will be denied.

Mr. DENMAN.—We note an exception.

Mr. DOLLAR.—(Continuing.) I made an error on my direct examination; the vessel was trans-

(Testimony of Robert Dollar.)

ferred to the M. S. Dollar Company, Limited, of Victoria, not the M. S. Dollar Steamship Company Limited. I am not sure the word "steamship" is a part of its designation. I was not in the harbor of Vladivostok during any of the time covering the description I had given of the conditions there. I have no information of them from the fact of my being on the ground. All the testimony that I have given regarding that is common report the world over. It was from information I had received. I would have had to have been at Vladivostok myself to see the Japanese ships blockading the port in order to say of my own knowledge that I knew that the port was blockaded. The owner of that ship is the California corporation, and the company in British Columbia simply is the holding company, and they have no interest in it whatever. The legal title is in the British corporation; the real title, the real owner, is a San Francisco corporation; the people who put up the money are San Francisco people.

Mr. DENMAN.—Q. You have spoken here of a certain policy of insurance that was offered in evidence. Were you in London at the time this was signed? A. No, sir.

Q. From whom did you receive it?

A. I got it from the agents, Bowring & Co.

Q. They were your agents in placing insurance, were they not? A. Yes, sir.

Q. And it was the fact that you had received this document from Bowring & Co., that you testified it had been executed in London?

(Testimony of Robert Dollar.)

A. London is marked on it there.

Mr. DOLLAR.—(Continuing.) I did not see it executed. I was not there in London when it was executed. I was in San Francisco when it was executed. I do not know the name of the person who signed it. I have seen his signature before, but I could not identify it.

Mr. DENMAN.—I move to strike from the evidence the instrument itself and also the testimony as to its execution, on the ground that it is hearsay and rests solely on information this gentleman received in San Francisco.

The COURT.—I overrule the motion.

Mr. DENMAN.—I note an exception.

Q. Now, Captain, you say that the vessel sailed for Vladivostok? A. Yes, sir.

Q. How do you know that?

A. Because I told the Captain to go there.

Q. Do you know in any other way; is that all you know about it?

A. It is pretty near enough for a managing owner to tell the Captain where he was to go. I don't know what else he could do.

Q. But you don't know whether he sailed there, other than the fact that you told the Captain to do that?

A. I saw his log after he came back, after he came home.

Q. You have no other evidence of it, have you?

A. No, I would have to be aboard I suppose, and take observations from day to day to be able to swear

(Testimony of Robert Dollar.)

she was on the way to Vladivostok. I instructed him to go to Vladivostok, through La Perouse straits; he went there and found the Straits blockaded with ice and he came back and went through the Straits of Tsugar and was captured there.

Mr. DENMAN.—I move to strike out all the testimony as to the sailing of the vessel to Vladivostok, the question of the voyage being placed in issue by the pleadings. The testimony of the witness is that he simply told the Captain to sail on that voyage. There is no testimony that the Captain knew that the ship sailed on that voyage.

The COURT.—The motion is denied.

Mr. DENMAN.—Note an exception.

Mr. DOLLAR, continuing, and in response to the questions asked by Mr. Denman, for the defendant, testified as follows: The vessel was captured at Tsugar Straits. I instructed him to go through La Perrouse Straits if it were possible. War was then being waged between Japan and Russia.

Mr. DENMAN, continuing, said:

Q. And naval engagements were likely to occur between the two? A. Yes, but I didn't see that.

Q. You didn't see them, but that's the fact, isn't it? A. Yes.

Q. And the Japanese and Russian cruisers covered this country between Japan and Russia; that is a fact, is it not? A. Yes.

Q. Where are the straits of Tsugar?

A It is water between the Island of Hokkido and the Island of Nippon.

(Testimony of Robert Dollar.)

Q. Do you claim that your man had gotten through at the time, or was he just trying to pass the straits?

A. He had gotten through.

Q. How far?

A. He had gotten into the sea of Japan.

Q. How far in?

A. I think I had better not tell you that, because I was not there.

Q. But your contention is that he had gotten through the straits? A. Yes, sir.

Q. And he was then captured by a Japanese man-of-war; is that your contention? A. Yes, sir.

Q. Of course, you don't know that of your own knowledge? A. No, I was not there.

Mr. DENMAN.—We move to strike out the testimony as to the capture of the vessel, on the ground that it is hearsay.

The COURT.—Motion denied.

Mr. DENMAN.—Note exception

CAPT. DOLLAR.—(Continuing.) One of my sons might have told me that a specific sum amounting to the entire premium had been offered back. I did not take particular notice; I wanted Three Thousand Pounds or nothing. The destination was ultimately Moji, but it was expressly provided in that policy that we would be covered until we reached a safe port; in fact, a safe neutral port, which would have been Shanghai. The policy provides that the destination is to be Vladivostok, and then we are covered until we reach some other safe neutral port after the voyage is completed out of harm's way. I told

(Testimony of Robert Dollar.)

the Captain to go to Vladivostok through La Perrouse Straits if they were not blockaded with ice. If they were frozen up, then to go through the Straits of Tsugar and through the Sea of Japan to Oskald Island. This was over the great northern circle. Tsugar straits are about three days' steaming from Vladivostok. Moji is in a different direction, about four days' steaming. The distance is greater to Moji than it is to Vladivostok if you are going direct to Moji Moji is in a different direction, an entirely different direction. The vessel was insured, if I remember right, for Thirty-seven Thousand Pounds, and it was placed, as all marine insurance is, in a whole lot of policies. I think there must have been 150 different people insured us, and there was a bunch of policies as thick as that (indicating), some placed at the same time, or as near as it is possible to do so. It was all placed within a couple of days.

Q. And some were placed before this, wasn't this one of the last policies to be placed?

A. I could not tell you that.

Q. You don't recollect that?

A. I don't recollect that. I was here and this was done in London. The order was placed for 37,000 pounds, and they started in and went around to the different companies; there was so many of them it took some time to do it. I don't know whether this was the first policy or the last policy that was placed.

[Testimony of A. H. Small, for Plaintiff.]

A. H. SMALL was then called as a witness for the plaintiff and sworn; he testified as follows:

I have been engaged in the business of marine insurance about twenty-four years, and I am manager of the marine insurance department of Balfour, Guthrie & Co., and have been running the department for twenty-four years. I am familiar with the usual and ordinary form of policies of the Maritime Insurance Company of Liverpool.

Mr. FRANK.—I show you a document now which is marked plaintiff's Exhibit "B," and ask you to examine it with reference to the printed matter therein, leaving out of consideration the written matter and the lines drawn through the printed matter, and I ask you whether or not that is one of the usual forms of policy issued by that company (handing)?

Mr. DENMAN.—We object to the question on the ground that it is immaterial, irrelevant and incompetent, there being no issue in this case as to what is the usual form of the policy of the Maritime Insurance Company.

The COURT.—I will admit the question for the present, anyhow.

Mr. DENMAN.—We note an exception, your Honor.

A. It is.

Mr. SMALL.—(Continuing.) The "warranted free of capture, seizure and detention" clause which has a line drawn through it towards the end of the

(Testimony of A. H. Small.)

policy, is one of the usual forms of the "warranted free from capture, seizure and detention" clause in English policies. Some of them differ from that form, the words "riots" and "insurrections" being omitted. Otherwise they are all of the same general form. All of the forms include "warranted free from capture, seizure and detention." All of them contain that.

Cross-examination.

Mr. DENMAN.—Q. I understood you to testify, Mr. Small, that if you took this policy and eliminated all these matters—by the way, you notice what is eliminated there, don't you? A. Yes, I see it.

Q. If you eliminate all those matters and the warranted free of capture, seizure, and detention clause, such as is contained there, that would still be the ordinary form of policy of the maritime insurance company? A. Not with these eliminations.

Q. So if you did say that on your direct examination, that is an error, is it?

Mr. FRANK.—He didn't say that.

A. I said, disregarding these eliminations it is the usual form.

Mr. DENMAN.—Q. Then if the policy had these eliminations in it, that is to say, if it were a policy without those clauses, it would not be a policy in the usual form of the maritime insurance company?

A. Not with these delections, it would not be.

Q. Nor would it be in the form of the ordinary and usual English form of policy, would it?

A. No.

(Testimony of A. H. Small.)

Q. Now, I understand that the "warranted free of capture, seizure and detention" clause differs in different policies, and some of the differences you have already pointed out? A. Yes, sir.

Q. There is a difference also between Hull policies and Cargo policies?

A. As a rule, they are similar in their tenor.

Q. But there is a difference in the usual form of policy of one to cover cargo, and the other to cover hull? A. Not invariably.

Q. Don't you have a different form in your office for the two characters of insurance?

A. We don't do hull insurance at all.

Q. You don't write hull insurance at all?

A. No, sir.

Q. But you are familiar with the writing of hull insurance, aren't you? A. Yes, sir.

Q. Let me ask you in regard to the practice in insuring hulls—

Mr. FRANK.—(Intg.) The practice where, Mr. Denman.

Mr. DENMAN.—For instance, take a British hull policy that would be issued by any office in this town; your experience has been in San Francisco, has it not? A. Yes, sir.

Q. And your knowledge of British policies is due to your experience here?

A. My experience with English hull policies is simply with policies received from England.

A. Have you ever seen this hull policy slip (handing)?

(Testimony of A. H. Small.)

A. I cannot tell exactly without reading it over. It appears to be the slip I have seen used.

Q. That is the usual English hull policy slip, is it not?

A. I could not say without reading it over.

Mr. FRANK.—I object to that as being indefinite. because it may be a San Francisco form, or it may be used in San Francisco or in England, and it makes a difference.

Mr. DENMAN.—Q. I will follow your question then; usual in insuring in the English hull policy form?

Mr. FRANK.—Where?

Mr. DENMAN.—Where in your direct examination did you mean, Mr. Frank?

Mr. FRANK.—I object to it, if your Honor please. If you mean San Francisco, it is immaterial.

The COURT.—Well, I am not prepared to say that that is true. Of course, you can ascertain on redirect examination whether that is the case.

Mr. FRANK.—Very well. I will withdraw it. I thought I would shorten the examination, that is all.

A. This resembles the form that is considerably used in San Francisco in connection with hull policies on the English form.

Mr. DENMAN.—Q. That is known as the English hull policy slip, is it not?

A. These slips are amended in various policies; they don't all follow exactly.

Q. Those clauses contained in there they are clauses in customary use in English hull insurance, are they not? A. In San Francisco.

(Testimony of A. H. Small.)

Q. And in England also, are they not.

A. Slips of this kind are not generally used in England.

Q. I am not talking about the slip; I am talking about the clauses contained in the slip?

A. I would have to read it all over to testify to that.

Q. Well, take the capture, seizure and detention clause?

A. That is about the usual form of capture, seizure and detention clause, I should say.

Mr. DENMAN.—I offer this in evidence.

Q. And in use in English hull policies?

A. It is about the same form; it appears to me to be shorter than the form I am in the habit of seeing.

Mr. FRANK.—You had better read it; the warranted free from capture, seizure, and detention clause in it.

Mr. DENMAN.—(Reading:) "Warranted free from capture, seizure and detention, and the consequences of any attempt thereat, and all other consequences of hostilities, piracy, and barratry excepted." By the way, Mr. Frank, there are two exhibits I introduced yesterday that are not marked. They will be exhibits A and B and this will be Defendant's Exhibit "C."

(The document was marked by the Clerk Defendant's Exhibit "C.")

Redirect Examination.

Mr. FRANK.—Q. As I understand you, Mr. Small, this is a form of slip that is used in San Fran-

(Testimony of A. H. Small.)

cisco, that is attached to a policy issued in San Francisco; is that right?

A. It resembles that form. I have not gone all through it.

Q. You don't know whether it is an exact form, but so far as the warranted free from capture, seizure and detention clause is concerned, that is one that is used in San Francisco; do you recognize that as part of the slip?

A. It appears to me to be somewhat shorter than the one I am in the habit of seeing, but the general tenor of it is the same.

Q. Are you prepared to say that this is one used in San Francisco; that is what I am asking you?

A. I am prepared to say that that clause in its general meaning is used in San Francisco. I would not testify that those exact words are in general use

Q. You are familiar with the practice, are you not, Mr. Small, of issuing war risk policies and taking war risks by Marine Insurance Companies?

A. I am.

Q. With respect to the issuance of a policy on a sea form, that is, having the ordinary sea risks, as this Exhibit "B" which has been shown you, what is the practice of marine insurers with respect to the manner of making that policy a war risk policy?

Mr. DENMAN.—I object to the question on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

(Testimony of A. H. Small.)

Mr. DENMAN.—And I object, your Honor, on the further ground—your Honor ruled before I had a chance, and I should have arisen before making it—on the further ground that the evidence is incompetent for the particular reason that the construction of the policy pleaded is entirely a matter for the Court. What other people would have done, what they might have done with other policies has nothing to do with the construction of this instrument pleaded.

The COURT.—I will admit the evidence.

Mr. DENMAN.—We note an exception.

A. The custom is to state that the policy covers only such risks as are excluded by the "free from capture" clause, usually giving the clause in full.

Mr. FRANK.—Q. And what is done with respect to those portions of the policy which do not apply to the war risk?

A. As a rule, nothing is done. It is left as it is.

Q. How was that indicated on the face of the policy?

A. It is written into the policy; it is written on the policy.

Q. And the writing of that on the policy supersedes all the other provisions of the policy that are not for war risk, is that it?

Mr. DENMAN.—I object to the question on the ground that it calls for the conclusion of the witness.

The COURT.—What he intends to ask, Mr. Denman, is this: If in the usual practical method of intending that result they took this course of writing

(Testimony of A. H. Small.)

that provision in and just leaving the other provisions stand upon the assumption that that is all that is necessary to have the war risk take effect and the other excluded.

Mr. DENMAN.—All right. Then we make a further objection, your Honor, that the intent to do this is not in any way traced to the defendant in this case.

The COURT.—That we cannot determine yet. The objection is overruled.

Mr. DENMAN.—We note an exception.

A. Yes, sir.

The COURT.—I did not understand your question to be asking of the witness the legal construction of the results of such action, but simply how it was usually done.

Mr. FRANK.—What the practice is?

The COURT.—What the practice is; yes.

[Testimony of J. B. Levison, for Plaintiff.]

J. B. LEVISON was then called for the plaintiff and sworn, and testified as follows:

I have engaged in the business of marine insurance for thirty years. I am Second Vice-president and Marine Secretary of the Foremen's Fund Insurance Company, and have been such marine secretary for eighteen years. In such capacity I have become familiar with what is known as the warranted free from capture, seizure and detention clause in English policies. The phrase at the bottom of Plaintiff's Exhibit "B," beginning "warranted free of capture, seizure and detention," is what is known as the "free of capture, seizure and detention" clause.

(Testimony of J. B. Levison.)

The wording varies slightly in different policies, but it is practically that clause both in England and San Francisco. In all the usual forms appear the words, "warranted free of capture, seizure and detention." I am familiar with the practice of insurance companies in taking war risks and issuing the sea form policy. The practice is to insert a clause covering the risks excluded by the risks of the "free of capture, seizure and detention" clause.

Mr. FRANK.—Q. And that is inserted on the face of the policy?

A. On the face of the policy.

Q. And in practice does that exclude all the other terms of the policy inconsistent therewith?

Mr. DENMAN.—I object to that upon the ground that it is calling for a conclusion of the witness, and also calling for a legal construction of the document.

The COURT.—No, I don't think so. It is not intended for that purpose. The purpose is to ask the witness if in practice, in the issuance of these policies of marine insurance by marine insurers, they take that means of expressing the intent to thereby exclude the other usual and ordinary marine risks, and confine it solely to war risks, as I understand it.

Mr. FRANK.—That is it exactly.

Mr. DENMAN.—If that is the case, we make the further objection that the intent is not traced to the defendant in this case.

The COURT.—That is the same objection as before; the same ruling.

Mr. DENMAN.—We note an exception.

(Testimony of J. B. Levison.)

A. It does.

Cross-examination.

Q. Is it not the ordinary and usual method of insuring in those policies against war risks, to insert a clause as follows: "This policy insures against those risks excluded by the warranted free of capture, seizure and detention clause in the usual form." Isn't that the customary form of doing it?

A. Hardly. The various offices have different methods of doing that. They will frequently add the entire clause. It is very hard to answer that question directly because the different offices and the different underwriters have different ways of writing their policies.

Q. And different methods of expressing their intent? A. Exactly.

Q. Is it not customary, however, to leave in the policy all the risks directly assumed; for instance, against men-of-war, detainment of princes, and so forth, and simply to write on the face of the policy, this is to cover the risks excluded by the warranted free of capture, seizure and detention clause, either express it in full or in the usual form of warranted free of capture, seizure and detention clause, either putting that on the face and leaving in the policy the direct risks assumed, showing it is a war risk only, and separate from any of the causes in the main risk assumed.

A. I don't quite get that.

The COURT.—Q. He is asking you if it is not usually simply to insert this clause, that is, that this

is to cover the risks excluded by the warranted free of capture, and if it is not usual to leave those provisions all undeleted?

A. It is. In answering that question, Mr. Denman, I would like to explain this: that in some offices it is the practice, where they insert a written clause in the policy, to strike out all the clauses that that is supposed to override. I am explaining my answer. In most of the offices that is not the practice, the idea being that the written clause overrides the printed clause and they pay no attention to the printed clauses.

Mr. DENMAN.—Q. So the practice there is in different offices, and, as you said before, different methods are used to express the intent of the insurer?

A. Exactly.

[Testimony of W. L. Comyn, for Plaintiff.]

W. L. COMYN was then produced on behalf of the plaintiff, was duly sworn, and testified as follows:

Mr. FRANK.—Q. You are the gentleman who procured the insurance here in question, are you?

A. I am—

Mr. DENMAN.—I object to the question as leading "to procure the insurance in question" here; that is the very thing we are litigating. The question should be asked in this way, "What did you do"?

The COURT.—I don't think he means that; nobody would assume that he means that. He means that this witness procured this policy.

(Testimony of W. L. Comyn.)

Mr. DENMAN.—That is the very question in issue, whether or not this is the policy that insured these persons, or whether it was another policy. That is the very thing we set forth in our answer.

The COURT.—The objection is overruled.

Mr. DENMAN.—We note an exception.

Mr. FRANK.—Q. State, if you can, what the conditions were that were agreed upon between you and the gentleman negotiating for the policy with respect to the place of delivery of the policy and the place for the payment of the premiums.

Mr. DENMAN.—I object to that on the ground that it is not shown who the person was with which they negotiated.

The COURT.—Of course, you cannot show the whole thing in one question.

Mr. DENMAN.—I object to the question on the ground that it is leading. It assumes that there were negotiations, and it suggests that there were negotiations as to these two matters.

The COURT.—The objection is overruled.

Mr. DENMAN.—Note an exception.

A. The policies were to be delivered to the Bank of California and payment was to be made by the Bank of California in exchange for the policies.

Mr. FRANK.—Q. Where?

A. In the Bank of California, at San Francisco.

Cross-examination.

Mr. DENMAN.—Q. Where were you at this time? A. I was in San Francisco.

(Testimony of W. L. Comyn.)

Q. How do you know these arrangements were made with the Maritime Insurance Company, in London?

A. I don't know what arrangements were made by the Maritime Insurance Company in London.

Q. How do you know, then, that this agreement was made? A. Between who, sir?

Q. I don't know; with whom did you make this agreement?

A. Do you mean on whose account did we make that insurance?

The COURT.—Q. No, who did you deal with in getting the insurance?

A. We dealt with Mr. Hart on behalf of Mr. Dollar.

Mr. DENMAN.—Q. When did you receive these policies?

A. I could not tell you the exact date, but some time in January, 1905.

Q. January, 1905?

A. No, I think not; I think the policies were received before the steamer sailed, but I would not like to swear to that.

Q. And all negotiations you had personally, or can testify to of your own knowledge, were with Mr. Hart and Mr. Dollar in San Francisco; that is correct, is it not?

A. Yes, sir, and with my London people.

Q. How was that done? A. By cable.

Q. You represented what company, Bowring & Co.?

(Testimony of W. L. Comyn.)

A. I am the Pacific Coast Manager of Bowring & Co.

Q. And you are the agent—

A. (Intg.) We are the agents of C. T. Bowring Company, Limited, of London.

Q. Agents of another company in London?

A. Yes, sir.

Q. And it was that other company that placed the insurance in London? A. Yes, sir.

Q. These matters are not matters that you know of your own knowledge; simply the words you received from the other company was that they placed the insurance? A. That is correct.

Q. And you don't know about anything that occurred in London, except by hearsay?

A. Except that they placed the insurance and they sent us the policies.

Q. You were not there?

A. I was not in London, no, sir.

Mr. DENMAN.—Q. Do you know who Mr. Hart was?

A. Mr. Hart, I believe, was the charterer of the steamer.

Q. He was being insured, wasn't he?

A. No, the steamer was being insured.

Q. Did not Mr. Hart have his cargo insured also?

A. I imagine he did.

Q. You imagine he did?

A. I didn't have anything to do with it.

Q. In obtaining insurance for the steamer, Mr. Hart came there with Mr. Dollar?

(Testimony of W. L. Comyn.)

A. He came at Mr. Dollar's instigation I understand.

Q. Was Mr. Hart an insurance agent that you know of? A. I don't know.

Q. Did he represent the Maritime Insurance Company? A. Who, Mr. Hart?

Q. Yes. A. I don't know.

Q. Do you think so?

A. It is impossible for me to say.

Q. All negotiations so far as you know, with the Maritime, were conducted in London, were they not?

A. Yes, sir.

Mr. FRANK.—Q. I understood you to say in your direct examination that you negotiated the insurance here with Mr. Hart? A. Yes, sir.

Q. And Mr. Hart was the charterer of the vessel?

A. I believed he was the charterer of the vessel.

Q. At any rate, he was procuring this particular insurance on behalf of Mr. Dollar?

A. That is as I understand it.

Q. And you made the contract and agreement to get the insurance for him? A. Yes, sir.

Q. And that contract was, among other things, that the policies were to be delivered in San Francisco and the premiums to be paid in San Francisco?

A. Yes, sir.

Q. And then you forwarded this application to your agents in London: is that right?

A. This is correct.

Q. And the policy was forthcoming and sent to you here? A. Yes, sir.

(Testimony of W. L. Comyn.)

Q. And you took that policy and delivered it as per agreement to the Bank of California and there received the premium, and that is the whole transaction, isn't it?

A. That is the whole transaction.

Mr. DENMAN.—Q. As I understand it, the negotiations, all of them, with the Maritime Insurance Company were had through your agents in London?

A. Through Bowring & Co. in London. They were the only people who negotiated, so far as I know, with the Maritime.

Q. And that was in response to this request on the part of Mr. Dollar to procure the insurance in London: you placed other insurance, did you not?

A. Yes, sir.

Q. By the way, did you place any policies prior to this insurance?

A. You mean prior to this particular one?

Q. Yes.

A. They were all placed at the same time.

Q. All placed at the same time?

A. Yes, sir.

Q. In London? A. Yes, sir.

The COURT.—You mean on this vessel?

Mr. DENMAN.—On this vessel.

Q. Do you know of your own knowledge when the transactions were entered into in London?

A. You mean the dates and the times?

Q. Yes. A. No, sir.

(Testimony of W. L. Comyn.)

Q. Do you know when the policy was delivered to your people in London?

A. No, I could not tell you the date that they received it. They sent it with others out to me.

Q. And your province in that matter then was to procure from the Maritime Insurance Company this insurance for Mr. Dollar; that is correct, is it?

A. That is correct.

Q. And the only transaction you know of, with the Maritime Insurance Company was had in London, and you were not present at any of those transactions? A. No, sir.

The COURT.—Q. The policy was in accordance with your understanding and request sent here and the premium paid here by the Bank of California?

A. Yes, sir.

Mr. DENMAN.—Q. As I understand it, the policy was not sent to you by the Maritime Insurance Company, but was sent to you by your people in London: that is correct? A. That is correct.

The COURT.—I understand that perfectly.

Mr. DENMAN.—Q. When was that policy received in San Francisco?

A. I could not tell the date. I could not say the exact date, but I think the policy arrived before the steamer was allowed to sail, but I could not swear to it.

Mr. DENMAN.—Q. Do you know of your own knowledge whether anyone ever said to the Maritime Insurance Company that that policy was to be delivered in San Francisco?

(Testimony of W. L. Comyn.)

A. No, I don't know of my own knowledge.

Mr. DENMAN.—Q. Do you know whether or not the Maritime Insurance Company ever heard that there was any arrangement that the premium was to be paid in San Francisco—of your own knowledge do you know that?

A. I don't know anything as to what the Maritime heard, or not, because I was not in London. The arrangement was made by our people in London with the Maritime Insurance Company.

The COURT.—Q. You know the premium was paid here?

A. I know the premium was paid here. I collected the premium myself.

Mr. DENMAN.—Q. And you paid the premium over to your people in London, and they paid it to the Maritime: is that correct?

A. That is correct as far as I know.

Q. And the arrangement that was made was that you were to receive the premium here and forward it to your people in London, and they were to pay it to the Maritime Company there?

A. There was no arrangement made here in regard to the payment to the Maritime, that I know of. We got the money when we gave the policies to the Bank of California.

Q. To the Bank of California?

A. Yes, sir. The Bank of California guaranteed to pay the money in exchange for the policies. It was a very big premium and we wanted to know where the money was going to come from.

(Testimony of Louis Kempff.)

Mr. DENMAN.—We move to strike out all the testimony of witness Comyn as to conversations or negotiations agreeing or looking to an agreement that the policy here sued on was to be delivered in San Francisco, on the ground that the same is irrelevant, incompetent and immaterial, and hearsay.

The COURT.—The motion is denied.

Mr. DENMAN.—We note an exception.

[Testimony of Louis Kempff, for Plaintiff.]

LOUIS KEMPFF, a witness called for the plaintiff, being duly sworn, testified as follows:

I am a Rear-Admiral in the United States Navy, and have been an officer in said navy nearly fifty-one years, and have had experience as such officer with blockades and blockade runners in the Civil War. I was stationed on the Atlantic Coast and the Gulf of Mobile, and Charleston and Wilmington, all along the Atlantic Coast seaboard. When the United States Government during the Civil War was blockading the coast of the Confederate States, I was an officer on board ships engaged in keeping the blockade.

Mr. FRANK.—Q. From your experience, Admiral, with respect to blockade running and blockade runners, I wish you would tell us what the usual and ordinary practice among blockade runners is with respect to clearing for a false port with false papers.

A. Well, as a rule, during that time they would come from England, they were all English vessels, and go to Bermuda or Nassau, and then clear from

(Testimony of Louis Kempff.)

there to Halifax; or if they were down below, run from Havana or into the Gulf—they would clear from some port in Mexico. Of course they would try to enter one of the blockaded ports, one of the southern ports.

WITNESS.—(Continuing.) Often we found papers on them. They never cleared for a blockaded port—that would condemn them at once. They always cleared for some other port of a neutral nation. They would vary from what the papers called for, and try to enter some one of the blockaded ports with cargoes that were of use to the Southern States.

Mr. FRANK.—Q. In your profession, Admiral, I presume it is also necessary for you to have a general knowledge of those practices and their effect on the international law. That is a part of the preparation for your calling, is it not?

A. We are supposed to be posted on international law.

Q. In the course of that preparation, Admiral, have you observed whether or not this practice that you have referred to has been common in other wars and at other times in the history of the world?

A. I am not familiar with that, what they practiced in other wars. I know they had different kinds of blockades. I never heard of its having been changed on having been different. To my knowledge, my impression is that it has been the general practice to pursue the course that we pursued during our Civil War.

(Testimony of Louis T. Kempff.)

WITNESS.—(Continuing.) It is my impression that it has been the practice generally for blockade runners running to a blockaded port, to carry false papers.

On cross-examination the witness testified: I do not know what the practice was in the late Russo-Japanese war. I was not there at the time. I do not think that in this respect, though, there has been any change. I do not know of my own knowledge—I never heard of any change having taken place in that respect.

[Testimony of Louis T. Hengstler, for Plaintiff.]

LOUIS T. HENGSTLER, called for the Plaintiff, being duly sworn, testified as follows:

I have been a professor of international law at the University of California, and between five and ten years have delivered lectures on that subject there. In the course of my studies and preparation I have become familiar with the practices of blockade runners with respect to clearing for a false port and carrying false papers. The practice of neutral merchants, neutral traders, in case of war and in case of the blockade of a port has been for 100 or 150 years, whenever the real intention was to carry goods to a blockaded enemy port to clear not for the blockaded enemy port but for a neighboring neutral port, and to carry papers in accordance with that intention, to carry papers for that neighboring neutral port, the true intention being, however, "to enter the blockaded port."

(Testimony of Louis T. Hengstler.)

Q. Are those papers what are known to the law as simulated papers or false papers?

A. They are known as false papers or simulated papers.

Q. How is that practice with reference to being notorious and universal, or only occasional?

A. It has been in numerous wars very notorious —so notorious that is has created a doctrine in International Law, a doctrine which is now upheld and supported by most of the nations in the world; I am not sure whether by most of the nations in the world, but by a number of nations.

Q. By England and America?

A. By England and America, and it has been indorsed by the Institute of International Law.

Q. What is that doctrine known as?

A. It is known as the doctrine of continuous voyages.

Q. Just explain what that means?

A. The doctrine refers to this practice of neutral traders taking a simulated destination for their goods, but intending to carry the goods further, either in the same vessel or by transferring the goods to another vessel, to go to a blockaded port. The doctrine is that it is the ultimate intention that governs.

The COURT.—Q. That is, the ultimate intention of the merchant?

A. Yes, sir, of the merchant, and although the voyage is apparently split up into two or possibly more voyages it is considered as a single voyage to

the destination, and the vessel or the cargo is seized and will be condemned even although the vessel may be captured on her way to the first port, to the ostensible port or the neutral port.

Q. Provided it can be shown that her ultimate purpose and her real purpose is to enter the blockaded port?

A. The blockaded port, yes, sir.

Mr. FRANK.—Q. And I understand you to say that that doctrine is the result of the notorious practice of blockade runners to which you have referred?

A. It is.

Mr. DENMAN.—Q. A neutral carrying contraband openly, without any false papers, to a port that is not blockaded, but to a belligerent port, taken by a belligerent, frankly says, "Yes, I am carrying contraband on board here"; makes no attempt to conceal it, never has made any attempt to conceal it, and is thereupon seized and taken into port: can the vessel be condemned for the open carriage of contraband?

A. She not only can but she certainly will be.

Q. Suppose a vessel was moving with things that were contraband and things that were not contraband; a mixed cargo, things that are contraband and things that are not; some are provisions for the army, we will say, and some are provisions for private persons, and these were being taken to a belligerent port openly and the vessel was overhauled and the question arose as to whether or not the vessel should be condemned: The vessel, mind you, I am not talking

(Testimony of Louis T. Hengstler.)

about the contraband goods; can the vessel be condemned for openly carrying contraband to a belligerent under the law of nations?

A. Oh, I thought you meant the contraband goods.

Q. No, the vessel itself, the condemnation of the vessel.

A. Well, I didn't understand your question. I thought it was the contraband goods, and my answer applied entirely to that.

Q. I am asking the law of nations in that regard.

A. The modern law of nations, I think, since the Declaration of Paris, a liberal application of it would not condemn the vessels, but before that the vessels were condemned.

Q. When was the declaration of Paris? In 1858?

A. No, in 1856.

Q. And that is supposed to embody the modern law of nations, in that regard?

A. Yes, sir, it does.

Mr. FRANK then offered the deposition of C. H. CROSS, which was received in evidence and read to the jury, and which is hereunto annexed and hereby made a part hereof, omitting notice to take such deposition and the certificate and return of the Commissioner taking the same, all of which notice, certificate and return are in due form. The said deposition is as follows:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY (a Corporation),

Defendant.

Be it remembered, that on this 28th day of August, 1907, pursuant to the annexed stipulation, before me, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, at my office, in the Epler Building, Seattle, Washington, by agreement of counsel the taking of the deposition named in the annexed notice, was continued until August 30, 1907, at the hour of 10 o'clock of said day; and on said 30th day of August, 1907, at 10 o'clock A. M., the witness C. H. Cross, on behalf of the plaintiff, being duly sworn to testify the truth, the whole truth and nothing but the truth, was then and there examined by Mr. W. H. Bogle, of counsel for the plaintiff, and cross-examined by Mr. Denman, of counsel for the defendant, as follows:

[Deposition of C. H. Cross, for Plaintiff.]

Q. (Mr. BOGLE.) Please state your name to the Commissioner? A. Charles H. Cross.

Q. Where do you reside?

A. San Francisco.

(Deposition of C. H. Cross.)

Q. What is your business or occupation?

A. Master mariner.

Q. How long have you held papers as a master mariner? A. Since 1895.

Q. How were you employed in December, 1904?

A. I was employed by the Dollar Steamship Company, as master of the "M. S. Dollar."

Q. Did you make a voyage on the "M. S. Dollar"?

A. Previous to that time?

Q. Did you make a voyage on the steamship "M. S. Dollar," leaving San Francisco about December 31, 1904? A. I did.

Q. Were you the master in charge of that steamship? A. I was.

Q. What was your destination?

A. From San Francisco?

Q. Yes.

A. Mojji or Vladivostock.

Q. For which port were you actually sailing?

A. I cleared for Mojji.

Q. Did you arrive at your destination?

A. I did not.

Q. Why not?

A. I was stopped by the Japanese fleet.

Q. At what place?

A. Off Hakodate, in the straits of Pasouke.

Q. On what day?

A. 27th of January.

Q. For what port were you making at the time you were stopped by the Japanese fleet?

A. For Vladivostock.

(Deposition of C. H. Cross.)

Q. When did you change your destination from Mojji to Vladivostock?

A. On the route.

Q. Why did you make the change?

A. To go to Vladivostock?

Q. Yes, sir.

A. That was my port of destination, calling at Mojji for coal—I did not get there.

Q. Of what did your cargo consist?

A. Hay and barley and oats.

Q. To whom was it consigned?

A. It was consigned to order.

Q. At what port?

A. At the Port of Vladivostock.

Q. You stated that you were stopped by the Japanese fleet? A. Yes, sir.

Q. In what way were you stopped?

A. I was stopped on the night of the 27th by a Japanese cruiser firing off two guns.

Q. What was the name of the cruiser?

A. The "Osomawan."

Q. Was that one of the Imperial Japanese war vessels? A. Yes, sir.

Q. (Mr. DENMAN.) Do you know that of your own knowledge?

A. I know that of my own knowledge.

Q. How do you know it?

A. Well, I saw the name of the steamer, saw the name of the cruiser.

Q. How do you know that she is one of the Imperial Japanese war vessels, of your own knowledge?

(Deposition of C. H. Cross.)

A. Oh, yes, I understand that she is; she was flying the Imperial flag, and she was manned by a Japanese crew. She had a Japanese name on her, and I was given to understand it was the name—her name was "Osomowan."

Q. Who told you that?

A. The officer that came from the cruiser.

Q. (Mr. BOGLE.) You say she fired two guns across your bow?

A. She fired two guns across my bow and played her searchlight all over us.

Q. What was done next?

A. I waited there for about an hour and a half, when a boat came alongside, manned by Japanese, and Japanese officer on board; he came on board and demanded to look at my papers.

Q. Did he make any statement as to who he was and by what authority he demanded these papers?

A. Yes, sir. He asked what ship we were. I told him that we were the "M. S. Dollar." He said, "Dollar"? I said, "Yes." He says, "We have been waiting a long time for you," and he demanded then to look at my papers, which I showed him.

Q. What was done next?

A. He looked over all the papers, and went through a conversation with the captain of the cruiser by signals during the night-time. He stayed in my office and looked over all my papers, and while he was reading them he had another sub-leftenant with him who went out and signaled all that he read

to the captain of the cruiser. And this went on for about four hours. And then the captain of the cruiser signaled back to him to have the hatches opened, that he wanted to examine the cargo, which was done. And while we were examining the cargo the officer then came to me and he said he had just got a signal from the captain of the cruiser that we were to proceed into Hakodate, as we were suspected of carrying prohibited cargo. I then asked him who was going to take the ship into Hakodate, and he says, "You will." He said, "You will follow the cruiser," which I did. I followed the cruiser into the harbor of Hakodate. When we arrived in there he took all the papers and would not allow me to go on shore, as I wanted to communicate with my owners, but he would not allow me to communicate or go ashore. And they took all the papers on board the "Osomowan" and looked them over and he came back again about 7 o'clock that evening and told me that I would have to appear before the prize court, and that we were to leave the next day in charge of a prize crew to the port of Yokoska. We proceeded out at 7 A. M. The Japanese people fetchel all their charts for me to work by along the coast line, they would not allow me to work on my own charts, and there was about twenty Japanese on board and two officers, and every movement I made they watched me very closely, and a guard was placed outside of my living room and also a guard in the office, and a guard in the chart-room. And every

(Deposition of C. H. Cross.)

movement I made in navigating the ship they watched very closely, and also made notes of it in their log-book, until we arrived at Yokoska. And when we arrived there that crew left the ship and we were handed over to the Admiral of the port, who kept us there. Then the prize court officials sent over to me to go over to the prize court. They asked me all sorts of questions, everything, where I was going, where we had been and everything and all about it. And they told me that they knew where I had been and where I was going, and when I had left, and that I had been through the ice, and around the Islands, and they had every information as to my final destination, and that they knew that the cargo was for the Russians.

Q. When the officers and marines from the "Osomowan" first came aboard your ship were they armed?

A. Oh, yes; they all had guns and cutlasses and everything of that sort.

Q. Were the Japanese who were put on board that ship to go to Yokoska armed?

A. They were, and they brought several boxes, which I took for granted were infernal machines, which they had around the door of my living quarters, and seemed to have them very handy.

Q. (Mr. DENMAN.) You do not know that of your own knowledge?

A. I do not know it of my own knowledge, but I presumed it was, because they looked like dynamite boxes that I have seen.

(Deposition of C. H. Cross.)

Q. How did they differ from cracker boxes?

A. Well, they were bound up with iron, strap iron on the ends, and had lids that lifted and they handled them very carefully and had kind of rope lanyards outside each box.

Q. How long did you remain on board your ship?

A. In Yokoska?

Q. Yes.

A. We were there about ten days.

Q. Up to about what date?

A. As far as I remember we were released on February 10th.

Q. Who took charge of the vessel after you were released?

A. The Japanese. The Japanese officers came on board with a crew.

Q. Up to that time were you confined on board ship? A. I was confined on board ship.

Q. And were your crew also confined on board that ship? A. The crew also.

Q. What was done after you were released on or about February 10th?

A. I went to Yokohama and was preparing to pay off the crew and send them home. While I was doing this I got a telegram from Home Ringer to remain with officers and crew pending our instructions.

Q. Where was that telegram from?

A. From Nagasaki.

A. Who is Home Ringer?

(Deposition of C. H. Cross.)

A. Home Ringer, they are merchants in Japan and the agents for Lloyds.

Mr. DENMAN.—What is the purpose of this testimony as to these telegrams subsequent to his leaving the ship?

Mr. BOGLE.—I understand it is to show that the underwriters took charge of the business of its own volition.

Q. Did you remain pursuant to the instructions in this telegram from Home Ringer?

A. I remained there.

Q. What was the next proceeding?

A. As far as I remember, they sent me another telegram to send the officers and crew home and remain in Yokohama myself. This was signed Home Ringer.

Q. Did you follow these instructions?

A. I followed these instructions. Then I got another telegram to go and see a Japanese lawyer. I went around to see this lawyer.

Q. Who was that telegram from?

A. Home Ringer. All the communications I had was from Home Ringer.

Q. Did he give the name of the Japanese lawyer to whom you were to apply?

A. I could tell the name if I heard it. I forget it now.

Q. Did this telegram instruct you as to whom you should see?

A. Yes, sir, it instructed me whom I was to see, gave me the name of the lawyer.

(Deposition of C. H. Cross.)

Q. Was the name Genzo Achehowa? A. No.

Q. Was he the Japanese advocate who appeared at the condemnation or prize trial?

A. He was.

Q. Who did he represent on that trial?

A. He represented Home Ringer.

Q. Did he appear on behalf of the vessel?

A. He was there on behalf of the underwriters, so I understood, and the vessel, of course he would be there on behalf of the vessel, because I had to give him a power of attorney.

Q. Did you make any contract with him to appear on behalf of the vessel or her owners?

A. None whatever.

Q. At the time you first went to him pursuant to instructions in the telegram from Home Ringer, did he appear to have any previous information about the matter?

A. None at all, he did not appear to know anything about it.

Q. Did you inform him by whose direction you applied to him?

A. Yes, sir. He knew that I had to come to him; he knew who I was; he knew, in fact, all the captains that were in Yokohama at that time.

Q. Was your vessel ever redelivered to you by the Japanese? A. No, sir.

Q. What became of her?

Mr. DENMAN.—Of your own knowledge.

A. She was as far as I know kept by the Japanese government and we bought her back again.

(Deposition of C. H. Cross.)

Q. You do not know that of your own knowledge, do you? A. We bought her back.

Q. You do not know it of your own knowledge, you did not buy her back yourself?

A. I did not buy her back myself, but I know Mr. Dollar did.

Q. Who told you that he did?

A. I saw him there buying her.

Q. Where was this? A. In Yokohama.

Q. How do you know he was buying her?

A. He went over for that purpose to buy her.

Q. Is that the only way you know?

A. I know that he bid at auction for her.

Q. (Mr. BOGLE.) By whom was she being sold?

A. By the Japanese government.

Q. Under what authority or pursuant to what order or judgment were the Japanese there selling her?

Mr. DENMAN.—He has not testified that there was a judgment.

A. I don't know whose authority. I presume the Japanese government were selling her for they were running her.

Q. Was she condemned as a prize, or do you know?

A. She was condemned as a prize, as far as I know. It was published in one of the Japanese papers that she was condemned. I remember seeing it in one of the Japanese papers that she was condemned as a prize for carrying contraband cargo.

Q. At any rate she was never returned by the Japanese authorities to you or your crew?

(Deposition of C. H. Cross.)

A. No, sir, not at all.

Q. How long did you remain in Japan?

A. I was in Japan up until the 29th of April on that occasion.

Q. Was that after the vessel had been sold by the Japanese government? A. Oh, no.

Q. When you left Japan then was the vessel still in possession of the Japanese government?

A. She was in possession of the Japanese government at Yokoska, I saw her there, they had taken all the cargo out of her.

Cross-examination.

Q. (Mr. DENMAN.) Who were the owners of the "M. S. Dollar"?

A. The M. S. Dollar Steamship Company.

Q. How long have you been in their employ?

A. Three years and a half.

Q. Do you know Robert Dollar? A. Yes.

Q. Do you know him well? A. Yes.

Q. Do you own any stock in that company?

A. Not in the M. S. Dollar Company.

Q. Do you own any in the Arab Steamship Company? A. No, sir.

Q. Do you own any stock in any of the Dollar Companies? A. No, sir.

Q. Do you know what insurance there was on this vessel? You speak of the underwriters in your direct examination what insurance was on this vessel?

A. I do not know exactly what was on her. I know there was a war risk policy on her.

(Deposition of C. H. Cross.)

Q. Do you know whether there was more than one? A. I do not know.

Q. Do you know the names of the underwriters that you speak of?

A. No, I cannot say that I do. I only know Lloyd's they represent all the underwriters, I understand.

Mr. BOGLE.—There is one matter I overlooked that I would like to ask, before you proceed.

Q. (Mr. BOGLE.) Captain, at the time you were making for the port of Vladivostock, when you were captured by this cruiser, did you know whether or not the port of Vladivostock was blockaded?

A. I did not know.

Q. What was the situation at Port Arthur when you sailed from San Francisco?

Q. (Mr. DENMAN.) Of your own knowledge, what you saw in Port Arthur yourself?

A. I did not know of the fall of Port Arthur. Port Arthur fell—

Q. Do you know this of your own knowledge?

A. I know now.

Q. You were not there, were you?

A. I was not there. I know from newspapers reporting that Port Arthur fell the day after I left San Francisco, but I did not know it until I was told by the Japanese officer who came on board the ship.

Q. (Mr. BOGLE.) As a matter of fact, did you expect to find the port of Vladivostock blockaded?

A. Well, I hadn't any idea about it. I thought probably it might be, especially if Port Arthur had fallen.

(Deposition of C. H. Cross.)

Q. Were you intending to run the blockade if you had an opportunity to do so?

A. I had no intention of running any blockade at all. I was just going to try to get to port if possible.

Q. (Mr. DENMAN.) Do I understand you to say you did not have any definite idea she was blockaded at that time?

A. I hadn't any idea it was blockaded at all.

Q. What position does Robert Dollar hold in the M. S. Dollar Company?

A. He is the president.

Q. When did you see Robert Dollar prior to leaving on the voyage on which these occurrences happened—you left San Francisco, I understand the last of December, 1904? A. Yes.

Q. And was Robert Dollar in San Francisco when you left? A. He was.

Q. Who was the charterer of this vessel?

A. A gentleman named Hart.

Q. Did you have a copy of the charter-party?

A. That is more than I could tell you just now. I had several kinds of papers. Whether I had a copy of the charter-party at that time—I suppose I would have.

Q. What did your cargo consist of?

A. Barley, hay and oats.

Q. You knew at that time that there was war between Japan and Russia, of course?

A. I did.

Q. You knew that both the Japanese and Russian cruisers were likely to be in the course you were to sail on, didn't you? A. Exactly, I did.

(Deposition of C. H. Cross.)

Q. What precautions did the owners take, what did they do to protect the insurers from capture of the vessel on that voyage? What direction did they give to you for the purpose of protecting the insurance, if any.

A. I do not know, I am sure, what the owners did in regard to the matter.

Q. What did they tell you to do?

A. They did not say anything to me about it. I had a letter, sealed letter, which I opened when I got to sea.

Q. As I understand it that cargo was consigned to Vladivostok? A. To order, Vladivostok.

Q. What route did you sail on to reach that port?

A. I first of all went up to try to go through La Perouse straits, went through the Kuril Islands, but I was stopped around there by the ice.

Q. That was your intention when you left San Francisco was it to go that way? A. Exactly.

Q. Who instructed you to take that route?

A. Nobody instructed me.

Q. Did you have a conversation with the owners about the route you were going to take?

A. None whatever.

Q. You swear to that, do you?

A. I swear to it.

Q. And it was your intention—

A. As far as I remember I had none whatever, no conversation with anybody about the route I was going to take.

(Deposition of C. H. Cross.)

Q. You went up to the Kuril Islands and wanted to take what is known as the inner passage?

A. No, there is no inner passage up there.

Q. What is the route you would take after you reached the Kuril Islands if you were going directly to Vladivostok? A. That is the nearest route.

Q. By the Kuril Islands?

A. By the Kuril Islands.

Q. What channel is known as the Muchi channel, is there such a channel?

A. No such channel that I know of.

Q. What direction is Vladivostok from the Kuril Islands? A. It is in a westerly direction.

Q. Westerly direction? A. Yes, sir.

Q. How far?

A. I suppose it would be a thousand miles.

Q. Do you pass any land to the southerly of the Islands or any land of any kind to the southerly of that route from the Kuril Islands in to Vladivostok?

A. Yes, you have got to go through La Perouse straits.

Q. Between what islands are these straits?

A. Between Sachalien Island on the north and Hokkido on the south.

Q. Is that one of the Japanese group?

A. Yes, used to be Yezzo.

Q. Which one of the group is it?

A. Northernmost of the Japanese group.

Q. Then you were intending to sail by the northern route to pass the most northerly of the Japanese Islands? A. Yes.

(Deposition of C. H. Cross.)

Q. And go directly west from there to the port of Vladivostok?

Q. Why did not you clear for Vladivostok?

A. Well, I do not know why—might have to go in for coal.

Q. Why did not you clear for Vladivostok if you were going there?

A. Well, on account of the war risk, I understand.

Q. Then what precaution did you take in order to prevent the vessel being captured by one or another of the two contending navies?

A. Well, I took the precaution to keep away from them by attempting to go through the northern route. When I found I could not get through there I went through the straits in the night-time.

Q. What did you do to prevent condemnation by the Russians for sailing and carrying papers for Mojji, when your pretended destination was Vladivostok?

A. I don't quite understand that—you will have to explain.

Q. Suppose a Russian cruiser captured you and found on your vessel papers for Mojji, whereas you were pretending to go to Vladivostok, in what way would you have prevented capture?

A. Well, I had two sets of papers.

Q. One was a true set of papers and the other a false set of papers?

A. Neither of them false.

Q. Just describe the two sets of papers?

(Deposition of C. H. Cross.)

A. Well, a set of papers made out for me to go to Mojji in case I should be held by the Japanese, which I presented to the Japanese.

Q. Now, what was the other set of papers?

A. The other set of papers was made out for Vladivostok, to go direct to that port.

Q. Now, these papers were complete papers, were they, every paper—what are the ship's papers?

A. Register, Clearance, Bill of Health, that is all that is needed for leaving port to go to another port.

Q. You also have bills of lading, don't you?

A. Only copies; these are only copies given to the captain for his own convenience. Bills of lading go through the bank and are negotiated that way.

Q. Who gave you these copies of the bills of lading?

A. As far as I remember they were put on board by the shipper who gave them to me. I could not say. These sort of things are sent down to the ship and come from the office, sent down to the ship in the captain's box. They are not exactly handed to him directly as I would hand one piece of paper to another person.

Q. And there were two sets of bills of lading, were there not?

A. I do not think I could remember that, whether I had two sets of bills of lading or what.

Q. Which bills of lading did you give to the Japanese? A. The one for Mojji.

Q. Now your cargo was really consigned for Vladivostok, was it not? A. Exactly.

(Deposition of C. H. Cross.)

Q. Of course you had real bills of lading on board for the consignees of that cargo, did you not?

A. Well, I must have had. I had some bills of lading on there, but these I never presented.

Q. Did the Japanese find them finally?

A. No.

Q. How many of the true papers, really designating your voyage as you intended to make it, did the Japanese get from you finally?

A. They got the true log-book, as far as I remember now.

Q. Did they get the true engineer's log?

A. I could not say.

Q. What is your impression in regard to that? What is your best recollection about that?

A. I could not tell you about the engineer's log, whether they got the engineer's log or not.

Q. They examined the engineer?

A. They did.

Q. They examined everybody on the ship?

A. They examined some of the engineers, the chief engineer and the quartermasters, practically everybody, all but the sailors.

Q. Now, Captain, when did you first tell the Dollar people that you were intending to clear for Mojji?

A. When did I first tell them?

Q. Yes, or when did they first tell you to clear for Mojji?

A. I am sure I could not tell you, Mr. Denman, whether they told me or whether I—

(Deposition of C. H. Cross.)

Q. You better try to call to your mind when they told you to clear for Mojji?

A. Well, it must have been sometime in December.

Q. When did you and Harry Hart and the Dollar people get together and discuss the voyage, in San Francisco?

A. I never remember such an occasion.

Q. As a matter of fact you did, didn't you?

A. I do not remember it.

Q. You and Hart, the charterer, and the Dollar people, in San Francisco, discussed the method in which the voyage was to be carried on?

A. I do not remember the occasion.

Q. Have any discussion at all with Hart?

A. I did on several occasions talk with Mr. Hart.

Q. When did you arrive in San Francisco on the "M. S. Dollar" prior to leaving on that voyage?

A. About the middle of December, if I remember.

Q. As a matter of fact was it not about the 6th of December? A. No, it was later than that.

Q. Where did you come from?

A. We came from some port in Japan.

Q. When did Dollar first tell you that you were going to Vladivostok—when did you commence to load?

A. When did we commence to load? It was sometime before Christmas.

Q. Sometime before Christmas? A. Yes.

Q. Ten or fifteen days before Christmas?

(Deposition of C. H. Cross.)

A. No, I do not think it would be ten or fifteen days, because we arrived somewhere about the middle of December, and then we had to discharge cargo which would take say a week.

Q. How long did it take you to load that cargo?

A. Oh, about ten days, in a port like San Francisco.

Q. When you came into port at San Francisco you discharged cargo and then took in cargo for Vladivostok? A. I did not learn it then—

Q. You did not?

A. I did not learn it for about five days after we commenced loading cargo.

Q. Where did you think you were going?

A. I knew we were going to Japan, but I did not know what port; they said we were going to Japan.

Q. They told you that you were going to Japan?

A. Yes—nobody told me that, it was the general idea that we were loading for Japan; at that time I was chief officer of the vessel.

Q. Who was the captain at that time?

A. Alexander Gow? Now, in the "Bessie Dollar."

Q. Who was your first officer on that voyage?

A. Ridley, now captain of the "Bessie Dollar."

Q. Give the full name?

A. I think Matthew Ridley; it is M.

Q. Who was the second officer?

A. The second officer on that occasion was Wilcox.

Q. Where is he now?

(Deposition of C. H. Cross.)

A. Wilcox, I think now he is in the White Star line, running between Liverpool and New York.

Q. What is his first name? A. I forget it.

Q. What was the chief's name?

A. Chief engineer?

Q. Yes. A. I forget.

Q. You remember the fellow that was examined in that Japanese case—recollect him that way?

A. The chief engineer?

Q. Yes. A. Oh, Scott.

Q. What is the first name?

A. I could not tell you.

Q. Is he still with the company?

A. No, he is not with the company.

Q. Do you know where he is now?

A. I understand he is with Butterfield & Swyers, on the China Coast.

Q. Did you have a supercargo on board?

A. No.

Q. Who represented the charterer on board?

A. Nobody.

Q. To whom were you to report at Vladivostok?

A. I was to report to General Somebody.

Q. General Somebody? A. Yes.

Q. Have you got the log-book?

A. Of that voyage?

Q. Yes? A. No, sir.

Q. Where is it? A. Japanese took it.

Q. Did you get it back from them?

A. No, sir.

(Deposition of C. H. Cross.)

Q. You received sealed instructions after you got to sea; what did they contain?

A. Typewritten letter—

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial, and not proper cross-examination.

Mr. DENMAN.—The purpose of discovering what the sealed instructions were, is to show agency of the captain, at the time of the capture. The direct examination has shown that the captain, acting as agent of the owners, did certain acts; also that he received sealed instructions from the office, and I desire to bring out what the instructions were.

Q. What were your instructions?

Mr. BOGLE.—And the further objection, first because not proper cross-examination, and it does not relate to any subject upon which the witness was examined in chief; and, second, the instructions inquired about were in writing and the writing is the best evidence.

Q. Where are these instructions now?

A. I could not tell you.

Q. What became of them?

A. I haven't the slightest idea what I did with them.

Q. Don't you know where they are now?

A. I do not.

Q. They are probably lost, are they not?

A. Maybe they are.

Q. Did you give them to the Japanese?

A. I cannot remember what I did with them.

Q. You do not know where they are now?

(Deposition of C. H. Cross.)

A. No.

Q. You could not find them if you looked for them? A. I could not.

Q. Now, what did they contain?

A. The instructions?

Q. Yes.

A. That I was to approach some island between the island of—I do not remember the name, and then in some hours, I do not know exactly what the hours were, I forget, and there I would be met by a pilot.

Q. There you would be met by a pilot?

A. Yes, sir.

Q. (Mr. BOGLE.) From who did you receive the instructions?

A. They came by letter; I don't know who they came from.

Q. (Mr. DENMAN.) Came to the ship in the captain's box? A. They came by mail.

Q. Did you obey them?

A. I could not obey them.

Q. Why not?

A. I was stopped by the Japanese.

Q. You forget the name of the Russian General to whom you were to report?

A. I could not tell, Mr. Denman, it was some kind of a Russian name, a General of the port or something or other to that effect.

Q. Russian General in command of the port, was that it?

A. As far as I remember I understood that was what it was.

(Deposition of C. H. Cross.)

Mr. BOGLE.—Are you speaking of your personal knowledge or from rumor, Captain?

Mr. DENMAN.—He testified it was his instructions.

Q. Who paid you your salary during that time; were you on the regular pay-roll of the company as you always had been? A. Exactly.

Q. And your officers and crew the same way?

A. Yes.

Q. Do you know how much Hart paid for the charter of the vessel?

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial; and not proper cross-examination.

A. Do I know?

Q. Yes. A. I do not know.

Q. Did you see the charter-party?

A. You asked me that question before, if I had a copy of the charter-party. I do not remember whether I did or not. I may have seen it. I have seen so many in the interval, backwards and forwards, I just forget whether I saw that one or not.

Q. Who got that clearance for you?

A. Mr. Melville Dollar and myself went to the Custom-house or someone from the office.

Q. That is the Dollar office, you mean the M. S. Dollar Company? A. Yes.

Q. What transactions did you have with the Russian Consul in San Francisco regarding this trip?

Mr. BOGLE.—I object as incompetent, irrelevant and immaterial, not proper cross-examination.

A. With the Russian Consul?

(Deposition of C. H. Cross.)

Q. Yes. A. Never met him.

Q. Did you have any discussion with any Russians before the sailing of the vessel?

A. None whatever.

Q. Now, as a matter of fact, Captain, did not you have two charter-parties on that vessel, one showing as a destination Mojji and the other Vladivostok?

A. Did I have two charter-parties, one showing Mojji and the other Vladivostok?

Q. Yes.

A. Well, as far as I remember I believe I did.

Q. As a matter of fact did not you have two log-books? A. Yes, we kept two log-books.

Q. As a matter of fact did not you keep two engineer's log—

A. Well, I understand the engineers did keep two log-books.

Q. He would not have done that unless you had told him to?

A. No, I don't suppose he would. There are always two or three log-books kept on board every ship.

Q. Is that the universal practice or of that company?

A. No, but there is always a log-book kept in the pilot-house—

Q. I am talking about the engineer's log-book. There are usually two engineer's log-books?

A. Yes. One kept in the engine-room by the engineer on watch, and there is another kept by the engineer.

(Deposition of C. H. Cross.)

Q. Now, as a matter of fact, were there not two engineer's log-books, one of which described the voyage as a voyage direct to Mojji and the other of which described the true voyage which you really took in attempting to go to Vladivostok?

A. Yes, sir.

Q. That was done under your directions?

A. Yes, sir.

Q. Now, you kept two journals, didn't you?

A. What do you mean by journals?

Q. Your hourly log, your watch log, your scratch log.

A. No, there was just one of these kept, a scrap log.

Q. You did not have a false one of these?

A. No.

Q. You kept a true scrap log but no false one?

A. No false one.

Q. Where was your bill of health for?

A. Your bill of health does not say exactly where it is for on your bill of health. Just tells you on that that there is no infection from the port you clear from.

Q. You mean to say that your bill of health does not have any destination on it?

A. I do not think the bill of health form does.

Q. Did you not tell the officers there that you were going on a voyage to Mojji?

A. Officers where?

Q. The health officers?

A. Yes, told them that we were going to Mojji.

(Deposition of C. H. Cross.)

Q. Now, Captain, what discussion did you have with any of the members of the Dollar Company regarding the precautions you were to take to escape capture?

A. If I remember right, in going to Vladivostok, to get there if I could. If I could not get there, go to Mojji, and I think that was all we had. There was not very much said about it at any time.

Q. You were to go to Mojji. Were you to sell your cargo there? A. No, await instructions.

Q. To await instructions. You say that you had no discussion at all regarding any precautions to be taken to escape capture?

A. Well, we did have something to say about it, but exactly what we did on that occasion or what was said I do not exactly remember.

Q. What was said about what you were to do when you were overhauled by a Japanese cruiser?

A. Well, what was said about one or the other I am sure, I do not know what was said. I was going to Vladivostok if I could get there.

Q. You testified on direct examination that you had no discussion with the owners about precautions. You afterwards said you received bills of lading showing that they knew exactly what you were going to do—I want to know what was said.

A. Ask me a direct question, Mr. Denman.

Q. What did your owners tell you to do in regard to protecting your ship from capture by the Japanese?

(Deposition of C. H. Cross.)

A. What was I to do in regard to protecting the ship from capture by the Japanese?

Q. Yes. A. By going the northern route.

Q. They told you to take the northern route. What did they tell you to do?

A. They did not tell me to take the northern route.

Q. What did they tell you to do when you met a Japanese cruiser?

A. They did not tell me to do anything.

Q. What did they send you these double bills of lading and double charter-party for?

A. Well, they did not tell me to do anything with them.

Q. They did not? A. No.

Q. When did they first tell you that they were going to send you these?

A. When they were going to send me these?

Q. Yes. A. Well, I cannot remember that.

Q. You remember talking it with them, don't you, you had some conversation about that?

A. About—

Q. About the charter-parties and the bills of lading? A. Well, it is so long ago.

Q. Did they just fall in out of the clear sky on you—you know they did not, that is a fact is it not?

A. Well, I would not say it was a fact, because there was several things said, and I was just promoted to the position, and I was told that we were going to Vladivostok.

(Deposition of C. H. Cross.)

Q. You were told you were going to Vladivostok. Yet you were not surprised when you received bills of lading for Mojji?

A. Well, I could not say whether I was surprised or not. You remember this is nearly four years ago.

Q. I know that. But it is the only time you have ever been captured?

A. Certainly it is the only time I have ever been captured.

Q. It was your first command?

A. My first command.

Q. And it would be more than likely you would remember instances of such a thing, would it not?

A. I do not see why.

Q. What did Dollar say to you when he went with you to the Custom-house and assisted you in procuring clearance for Mojji? A. What did he say?

Q. Yes.

A. I am sure I could not remember what he said on that day.

Q. You had some discussion then about this voyage that you were going on, didn't you?

A. No, I don't think we did.

Q. Will you swear now you never had any discussion with the owners regarding the fact that you were to use one set of papers in one case and another set of papers in another case—will you swear to that?

A. Well, it being so long ago, Mr. Denman, I don't know that I could swear to it.

Q. I did not ask you whether you could—will you swear to it?

(Deposition of C. H. Cross.)

A. I would not like to, because I may have said something and I may have not; we may have had some conversation. There was so much conversation going on about that time.

Q. Oh there was then. Now, with whom?

A. One way or the other, that we were going to Vladivostok?

Q. You say one way going to Vladivostok, now what was the other way?

A. Well, that we were to go to Mojji for coal, go there for coal if you haven't got enough here, several things said about it.

Q. What were you to do with these papers, when you received a double set of papers?

A. Keep them on board the ship.

Q. To carry them on the voyage, and the owners did not care, did not give instructions whether you were to present one set of papers or another to a man-of-war, is that it?

A. They never told me anything about a man-of-war or what to tell him.

Q. These papers were sort of sent to you for you to guess at as to what to do?

A. I was practically left to my own judgment as to what to do with the papers.

Q. You were told to get the vessel through, if you could. A. Exactly.

Q. And you were given false papers to use as the occasion arose, that is the fact, is it not.

A. I was given false papers to—

Q. To use as the occasion arose?

(Deposition of C. H. Cross.)

A. As what?

Q. To use in one occasion or another as was necessary to carry out your instructions, that is the fact?

A. Well, yes, it is.

Q. Do you mean to say that you were not told by the representatives of the Dollar people to run that blockade if you could?

A. To run it if I could?

Q. Yes.

A. We did not know it was blockaded.

Q. Did not you have a discussion with the members of the Dollar Company in which they said it was blockaded?

A. No, it was not blockaded at that time.

Q. Do you mean to say that the fear of blockade was not in your mind at all when you left San Francisco?

A. Oh, yes. I fully expected that that would be blockaded as soon as Port Arthur fell, but I had no idea how soon it would be.

Q. But at that time you did not know that it was blockaded.

A. I did not know it was blockaded until I was told by the Japanese officer that stopped me.

Q. You say the vessel was condemned. On what ground was she condemned?

Q. (Mr. BOGLE.) Of your own personal knowledge, Captain?

A. I understand she was condemned.

(Deposition of C. H. Cross.)

Q. Not what you understand, but state what you know of your own personal knowledge—did you have any?

A. Well, I could not give you any from my own personal knowledge.

Q. (Mr. DENMAN.) Have you personal knowledge that she was condemned?

A. Only what I saw from the newspaper and by being forced out of the ship.

Q. Do you know of your own personal knowledge of any underwriter having anything to do with the telegram that you received in Yokohama, I mean do you know of your own knowledge—did you see any of them sent?

A. Now, you will have to explain better to me what you mean.

Q. Well, you say that you understood the telegrams that you received while in Yokohama came from representatives of the insurers or underwriters.

A. Yes.

Q. Do you know that of your personal knowledge or is that simply what you suppose?

A. Well, it must be from my own knowledge; they were sent by Home Ringer in a telegram and I know that Home Ringer are agents for Lloyds of London.

Q. Do you know that of your own knowledge or did some one tell you they were agents? Did you ever hear Lloyds say they were agents?

A. No, I never heard Lloyds say they were agents, but I know Home Ringer are Lloyds agents

(Deposition of C. H. Cross.)

all over Japan and the Captains that were there at the same time had telegrams sent by the same people.

Q. Were there other captains in port at the same time? A. Several.

Q. That is all you know about it?

A. That is all I know about it.

Q. By them I now have reference to the connection of the insurance or underwriters with that telegram. That is all you know? A. Yes.

Q. You say that you received a Captain's box. What is a Captain's box?

A. Well, all kinds of papers, your register and letters and all kinds of things put in, belonging to the ship.

Q. That is given you by the owners, is it not?

A. It is sent down from the office.

Q. By the office you mean the office of the M. S. Dollar Company? A. Yes.

Q. Did you have any Russians on board the ship?

A. No, sir.

Redirect Examination.

Q. (Mr. BOGLE.) Captain, you stated that you had a double set of papers. A. Exactly.

Q. One set showing your true destination to Vladivostok and the other set showing Mojji as your destination? A. Yes.

Q. You used this second set of papers in an endeavor to avoid capture when stopped by the Japanese man-of-war, did you not? A. Exactly.

Q. Was that the purpose for which you kept them?

(Deposition of C. H. Cross.)

A. That is the purpose I kept them for.

Q. I understand you to say when you left 'Frisco, your general instructions were to make Vladivostok if possible. A. If I could.

Q. If you found that you could not get to Vladivostok you were to go to Mojji?

A. Go to Mojji.

Q. And you would have reported from there to receive further instructions? A. Exactly.

Q. When you left San Francisco the port of Vladivostok had not been blockaded?

A. Not to my knowledge.

Q. You say that you were to report to General somebody at Vladivostok? A. Yes.

Q. In what paper was this name given, in which one of your papers?

A. As far as I remember it was in the sealed instructions I got.

Q. You say this was a Russian name?

A. I believe it was a Russian name.

Q. Did the letter designate his capacity at Vladivostok do you remember?

A. I do not remember that.

Q. As a matter of fact do you know whether he was a merchant in Vladivostok or a Russian official?

A. I do not know.

Q. (Mr. DENMAN.) What instructions did your owners give you about reporting when you got to Vladivostok?

A. Just report my arrival there.

Q. To whom were you to report there?

(Deposition of C. H. Cross.)

A. In Vladivostok?

Q. Yes. A. Instructions from my owner?

Q. Yes.

A. I had no instructions who to report to.

Q. They left that to your agent.

A. They did not have an agent there. We had no agent there.

Q. To whom were you to report the arrival of your cargo?

A. What I had in this sealed letter, to the commander of the port, commanding general of the port or somebody of the port.

Q. That was the only instructions you received, was it? A. Yes, as far as I remember.

Q. Did you think it very strange that you should leave the city without instructions from your owners—I now refer to the port of San Francisco?

A. The only instructions I got was to what port to go, and I told you that.

Q. Did not you think it very strange that you were not instructed to report to anybody at your destination of the arrival of your cargo and vessel?

A. No, I do not think there is anything very strange about it. Often enough ships go to a port, they go there and they are consigned to order, and when they get there the owners are communicated with and the agent comes on board the ship where you are anchored.

Q. In this case you were going to have sealed orders when you got to sea?

(Deposition of C. H. Cross.)

A. I did not know until I got them; these orders came through the mail.

Q. Your owners gave you no instructions to whom to report? By the way, did Hart give you any instructions?

A. No, Hart did not give me any instructions at all.

Q. Where were you to collect, you say you had this cargo on board, where were you to collect your freight moneys for it?

A. Where was I to collect?

Q. Where were you to collect the freight moneys for that cargo?

A. I believe the freight money was prepaid. I understand so. We never collect, the master of the ship never collects at all.

Q. What did the cargo consist of?

A. Barley and hay and oats.

Q. How were they, in sacks?

A. The barley and oats were in sacks.

Q. And the hay baled, of course.

A. In small bales.

Q. How were they bound, do you know?

A. Oh, as they usually are for putting up hay little small bales.

Q. How large bales, about 18 inches by 12 inches?

A. Oh, more than that.

Q. Two feet by one foot?

A. I suppose something like that.

Q. Did you ever carry any cargo before to Vladivostok? A. Never.

Q. Ever been in there before?

A. Never been in that port.

(Deposition of C. H. Cross.)

Q. Had you ever sailed to the China coast before?

A. Several times.

Q. Ever been up on the Siberian Coast before?

A. Never on the Siberian Coast.

Q. Let me ask you a question, did you or did you not intend to run the blockade, if there were a blockade? A. Did I intend to run it?

Q. Yes.

A. Well, I do not know that I had any such intention. If I could get there I would have gone.

Q. Even if she was blockaded?

A. If she was blockaded, if there had been nobody in my way I would have gone right in; if I had got in I would not know that it was blockaded until I got in.

Q. You knew that cargo was contraband, didn't you? A. I did not know it was contraband.

Q. Why did you present false papers to the Japanese, they could not take the ship?

A. In order to try to get to Vladivostok.

Q. They could not stop you if it was not contraband, could they?

A. Yes, they stopped everybody; the Japanese allowed it was contraband—they declared it contraband of war, so I understood.

Q. Then you knew it was contraband of war at that time? A. I don't—I did not know.

Q. Why did you present false papers if you thought it was not contraband?

(Deposition of C. H. Cross.)

A. In order to get to Vladivostok.

Q. They could not hold you if it was not contraband? A. Yes.

Q. Why?

A. Because they held everybody up.

Q. Do you mean to say as a sea captain that a belligerent nation can hold up your vessel for carrying goods that are not contraband?

A. Well, did not they do it?

Mr. BOGLE.—I object as incompetent, immaterial and irrelevant, and calling for a decision by the witness of a legal question.

Mr. DENMAN.—We submit that the capacity of the commander was brought out in direct examination, which would allow us to see what he knows about commanding vessels on voyages of this kind.

Q. Then you do not know whether the Japanese did or did not treat that kind of goods as contraband, is that it?

A. Well, I did not know when I left whether they would treat it as contraband. I was thoroughly under the impression when we left that it was not contraband. As you must know these Japanese declared it contraband of war.

Mr. FRANK.—That is our case.

[Proceedings had Relative to Certain Motions Concerning Certain Evidence, etc.]

Mr. DENMAN.—If your Honor please, my understanding is that the case of my opponent is closed. I desire to make certain motions concerning certain

evidence that has been put in. The purpose of this motion is, your Honor, now that the testimony is in, and it appearing, according to our point of view, that these matters in San Francisco have not been traced up to the defendant, that it now may be opportune—certainly it was not the proper time earlier in this case—to make the motion. So I move, as I have stated—

The COURT.—I think they are entitled to do that. If in their theory of the case their motion was premature because you might have supplied the supposed deficiency, they have a right to make their motion now, based upon the state of the case as it is at this time with the plaintiff resting.

Mr. DENMAN.—We move to strike out the testimony of Capt. Dollar that the vessel sailed on a voyage to Vladivostok, on that ground that the same is immaterial, irrelevant and incompetent—that is to say, if our motion was premature and the statements of Captain Dollar were not connected up with the other witnesses necessary to make them not hearsay or immaterial, irrelevant and incompetent, we now move to strike out on the grounds stated.

The COURT.—I think that is fully covered by the previous ruling. I will make the same ruling and you can have your exception at this time.

Mr. DENMAN.—We except.

Mr. DENMAN.—There is only one other matter in the same category, as I take it, your Honor. I move to strike out all the testimony concerning conversations regarding the prepayment of the premium

as a consideration for the writing of the policy, on the ground that they are irrelevant, immaterial and incompetent and hearsay, and cannot be used to vary the written instrument. There was no subsequent showing, according to our theory of the case, your Honor please, that the instrument pleaded was proved.

The COURT.—The motion will be denied.

Mr. DENMAN.—Note an exception.

Mr. DENMAN.—If the Court please, Mr. Frank in his statement at the last session of the Court before to-day, stated that the policy in the third amended complaint pleaded, and the policy pleaded in the answer to that complaint were the same policy, one with the portions in it that were deleted appearing on the face of the complaint—left in the exhibit in the complaint, and the other in the answer, with the portions that were deleted left out, but that they were one and the same policy, and there was no question as to the execution. We adopt the theory of our opponent and will continue our trial on that theory.

[Decree of the Yokosuka Prize Court.]

The decree of the Yokosuka Prize Court was admitted by the plaintiff to be a true copy of the decree of that Court in the case of the British steamer "M. S. Dollar," and that said Court was a Court duly organized and existing under and by virtue of the laws of the Empire of Japan, with jurisdiction in prize causes. Thereupon said decree was offered in evidence by Mr. Denman. The decree is as follows:

JUDGMENT.

The M. S. DOLLAR COMPANY, LIMITED, Victoria, British Columbia,

Appellant.

ROBERT DOLLAR, President,

Representative of the said Company.

GENZO AKIHAMA, Advocate,

Attorney for the Appellant.

Having investigated the matter of the capture of a British steamer "M. S. DOLLAR," this Court decides:

SENTENCE:

The capture of the "M. S. Dollar," British steamer, is valid.

FACTS AND REASONS.

The said "M. S. DOLLAR" is owned by the appellant company, and is a merchant vessel under the British flag and registered at the Port of Victoria, British Columbia. Under the charter-party dated San Francisco, the 8th of December, 1904, between M. S. DOLLAR STEAMSHIP COMPANY, agents of the appellant company, and HARRY J. HART, of San Francisco, the steamer left San Francisco on the 31st of the same, loading aboard her about 26,200 bales of hay, about 14,600 sacks of barley and 32,200 sacks of oats for the purpose of transporting them to Vladivostock, Russia. In the ship's papers the port of arrival is Moji, and the bill of lading is to order or his assigns. The steamer passing through the Muchi Channel, Koorile

Islands, sailed toward the La Perouse Strait, but was prevented to pass the strait from floating ice. Thereby the steamer navigating southward passed Iturup Channel and was going toward Vladivostock via the Tsuruga Strait. However, in her log-book, journal and chief engineer's log-book her route is concealed and shown as if she took the direct course from San Francisco to the Tsuruga Strait. On the 27th day of January, 1905, the steamer was, while in the act of passing through the said strait, captured near Ryuhizaki Promontory by the "ASAMA," of our Imperial Navy.

The above facts are well corroborated by the statement made by the 1st Lt. Ogura, acting Captain of the "ASAMA," the examinations of Charles Cross, Master of "M. S. DOLLAR," the crew of the said steamer, Edward Clarence Davies and R. Stanley Dollar, and from the ship's certificate of nationality, charter-party, bill of lading, cargo inventory, clearance certificate from San Francisco, bill of health, log-book, journal, chief engineer's log-book, genuine journal produced from the Master after his confession and the statement made by the appellant's attorney.

The essential points raised by the appellant are:

The appellant allowed the charterer to engage in the transportation of goods from San Francisco to Moji. The attempt to sail to ports other than the port designated in the charter-party was the act of the charterer and the ship-owner had nothing to do with the act. Moreover, her cargo does not belong

to the ship-owner, and therefore, even if the cargo be a contraband of war, the ship should not share condemnation. If it happened that Vladivostock was not described in her ship's papers as a port of call, it is simply a defect in the papers, but cannot be deemed false means of evading capture. Even admitting for a moment that such was a means of smuggling, it was the act of the charterer for the purpose of evading capture of his goods, and so long as the ship-owner did not participate in the act, the ship should not suffer its consequence. Moreover, the said cargo does not belong to that class of goods that is absolutely contraband of war, and therefore it is clear from the case of the "Neptune," captured in the war 1798 between Great Britain and Holland, that when, as in the present case, such cargo was destined for such a port as Vladivostock, which is a naval as well as a commercial port, it is proper, so far as there is no contrary evidence, to admit that the cargo was destined for the said Vladivostock as a commercial port. Besides the said cargo is not from its nature limited to military or naval use. The appellant asked for the release of the said ship on these grounds.

This Court considers that Vladivostock is not only a very important Russian naval port and base of her squadron in the East, but since the Russo-Japanese War it is a basis of military supplies, and the Russian Government has collected there as much military and naval provisions as possible. It is clearly known that ordinary traffic to that port has almost stopped. Therefore so long as there is no clear

evidence to prove to the contrary, it is proper to consider the said cargo a part of such provisions, because hay, etc., which are occasionally contraband of war, may according to circumstances such as their destination to Vladivostock, be deemed contraband of war. In the case of the "Neptune" referred to by the appellant's attorney, animal fat was intended to be carried to Amsterdam and therefore such case does not apply to the present case. Not only so, but the grounds of the judgment in the said case even support the argument that the cargo in the present case is a contraband of war, because Amsterdam was at that time chiefly a commercial port, and very different from the present condition of Vladivostock, but Brest, mentioned in that judgment, was very similar to the present state of Vladivostock. From the quantity of the cargo, false means of the transportation and the statement of her Master, there is no doubt that it was destined for the enemy's army, and it was therefore proper to deem it a contraband of war. While it is clear from the examinations of her Master and crew and others, that the ship's destination was Vladivostock, and while in the genuine journal it was minutely entered to the effect that as the course of the steamer was on the 23rd January prevented at the point northward of Kunashiri Island from floating ice she turned her way, and other true entries since then, the port of arrival mentioned in the ship's papers produced at the time of her capture in Moji and in the log-book, journal and chief engineer's log-book, her true course is concealed and shown as if she took a direct course from

San Francisco to the Tsuruga Strait. At the time of search by the Acting Captain of the "ASAMA," as well as at the time of examination by the Judge in charge, the Master and crew did fail to make straight answer. After several examinations they at last confessed the truth, and these circumstances are enough to recognize the fact that the evasion from capture by false means had very carefully been prepared. In short, the said S. S. "M. S. DOLLAR" did engage in the transportation of a contraband of war by false means. In such cases it is a recognized doctrine and usage of the International Law that such ship shall be condemned together with such contraband of war whether the ship-owner did participate in the act or not. For these reasons the said steamer shall be condemned, and therefore it is not necessary to discuss other points raised by the appellant.

Therefore the above sentence is hereby given.

Given at the YOKOSUKA PRIZE COURT in the presence of Inspector KOBAYASHI YOSHIRO, on the 28th April, 1905.

Presiding Judge, TAKASHI HASEGAWA.
Associate " KISABURO SUZUKI.
" " CHUKI SHIM-OKA.
" " TETSUKICHI KURACHI.
" " MICHIZO TOKUDA.
Court Clerk, KAZUYOSHI MOROHASHI.

Court Seal.

The above is a copy 2nd May, 1905.

KAZUYOSHI MOROHASHI,
Clerk of the Yokoshka Prize Court.

L. S.

(Testimony of Thomas H. Craig.)

Mr. DENMAN.—Now, we move to strike out all evidence other than the decree, as to the reasons for the condemnation of the vessel upon the ground that the other evidence is immaterial, irrelevant and incompetent.

The COURT.—The motion is denied.

Mr. DENMAN.—We note an exception.

[Testimony of Thos. H. Craig, for Defendant.]

THOMAS H. CRAIG was then called as a witness for the defendant, was sworn and testified as follows:

I am a Custom-house official—entrance and clearance clerk in the Custom-house. I was in charge of clearances in December, 1904, and recollect the clearance of the "M. S. Dollar" through my office in the usual manner. The usual method of clearing a vessel is that the Master presents an outward foreign manifest, as we call it, containing a complete account of the cargo laden on board the vessel. A manifest was presented in this case, and I now hold it in my hand. It is in the usual official form. This is not a clearance; it is a manifest of the vessel; a clearance is another document. This is sworn to by the Master. We received it on the 31st of December, 1904. There are two manifests—one given to the Captain, and we retain one. I gave one to the Captain and retained this one. The signature of N. S. Farley, Deputy Collector of Customs, appears attached to that. He was Deputy Collector of Customs at that time, and that is his signature.

(Testimony of Thomas H. Craig.)

Mr. DENMAN.—We offer the manifest in evidence.

Mr. FRANK.—I will read the affidavit, with your Honor's permission, in order to show that the assumption sought to be drawn by the direct examination is not warranted. (Reading:)

"Oath of Master on Clearance for a Foreign Port.

"Nationality—Br.

"Crew—51.

"District and Port of San Francisco.

"C. H. CROSS, Master or Commander of the Str. 'M. S. Dollar,' bound from the port of San Francisco to Moji, do solemnly, sincerely and truly swear that the Manifest of the Cargo on board the said steamer now delivered by me to the Collector of this District, and subscribed with my name, contains, according to the best of my knowledge and belief, a full, just and true account of all Goods, Wares and Merchandise now actually laden on board the said vessel, and of the value thereof; and if any other Goods, Wares, or Merchandise shall be laden or put on board the said steamer previous to her sailing from this port, I will immediately report the same to the Collector. I do also swear that I verily believe the duties on all Foreign Merchandise therein specified have been paid or secured, according to law, and that no part thereof is intended to be relanded with in the United States, and that if by distress or other unavoidable accident it shall become necessary to reland the same, I will forthwith make a just and

true report thereof to the Collector of the Customs of the District wherein such distress or accident may happen.

"C. H. CROSS,
Master."

"Sworn to, before me, this Dec. 31, 1904.

"N. S. FARLEY,
Deputy Collector of Customs."

Mr. DENMAN.—I desire to read to the jury the following portions of said Manifest: "Report and Manifest of the cargo laden at the Port of San Francisco, on board the British Steamship 'M. S. Dollar,' whereof H. C. Cross is Master, bound for Moji. San Francisco, Dec. 31, 1904, Packages and contents, with articles fully described, 2700 bales hay. Quantities, pounds, gallons and so forth, 2,700,000"—I suppose pounds. "Value of domestic merchandise, 21,600."

The COURT.—Why don't you omit those details, Mr. Denman? Is there any materiality in it except that it is in those details?

Mr. DENMAN.—"To be landed at Moji." The point is that the statement in here is that the goods are to be landed at Moji.

Mr. Denman thereupon offered in evidence the depositions of RALPH ILIFF SIMEY, and JOHN ANDREW HAMILTON, witnesses, being residents of England, which were admitted in evidence and read to the jury, and are as follows:

Deposition of Ralph Iliff Simey.

Direct Interrogatories.

1. Q. What is your name and profession?

A. My name is Ralph Iliff Simey, and I am by profession a Barrister-at-Law.

2. Q. How long have you pursued that profession? A. About 21 years.

3. Q. Do you make a specialty of the law of marine insurance, and are you familiar with that law as existing in Great Britain? A. Yes.

4. Q. What experience have you had in that branch of the law?

A. I have been engaged professionally in Marine Insurance cases. I am one of the Editors of the 7th Edition of Arnould on Marine Insurance which was published in 1901—also of the 8th Edition which is now in the press and also of a smaller work on the Marine Insurance Act, 1906.

5. Q. Do you know the work entitled ARNOULD ON MARINE INSURANCE, SEVENTH EDITION, Edited by E. L. DE HART and R. I. SIMEY? A. Yes.

6. Q. Is that work a standard authority on the law of marine insurance in the Kingdom of Great Britain?

A. The first two editions (the work of the original author) published in 1848 and 1857 are of standard authority. The 7th edition is based on the text of the 2d edition and to this extent is of standard

(Deposition of Ralph Iliff Simey.)

authority. The 7th edition, so far as it is not a reproduction of the 2d edition, is too recent a work to be of standard authority.

7. Q. Are you the R. I. Simey one of the editors of that work? A. Yes.

8. Q. Do you know John Andrew Hamilton, K. C.? A. Yes.

9. Q. What can you say of his professional capacity with reference to his knowledge and experience in the law of marine insurance of Great Britain?

A. There is no one who by knowledge and experience is better qualified to advise upon and deal with any question as to the English Law of Marine Insurance.

10. Q. If a vessel carrying contraband to a belligerent port, where the cargo is not owned by the owner of the vessel and the owner of the vessel and its officers are in no way parties to any attempt to conceal its nature, is captured by the belligerent, what is the law of Great Britain with reference to the right to condemn the vessel for such carriage?

A. If there are no more relevant facts than are stated in this question, there would be no right to condemn the vessel. If the owner of the vessel was privy to the carriage of the contraband goods, then, under the circumstances stated, there would be, apart from other circumstances, no right to condemn the vessel. Such at least would appear to be the better opinion, though Mr. Hall maintained the contrary (International Law, 4th Edition, paragraph 247: 5th Edition p. 667). If, however, there be any miscon-

duct on the part of the ship-owner, or "malignant and aggravating circumstances" such as the use of simulated papers, then the vessel would undoubtedly be involved in the fate of the cargo and be liable to condemnation. See Ringende Jacob 1 C. Rob. at p. 91.

11. Q. What is the law of nations on the state of facts set forth in the last question?

A. So far as there is any Law of Nations it is the same as that of England.

12. Q. If, while under a policy of which Exhibit "A" hereunto annexed is a copy, a vessel is condemned for carrying false papers, whereby is defeated the owner's right to recover from the underwriter, what was the law of Great Britain between December 1, 1904, and May 1, 1905, with regard to the right of the insurer on such policy to retain the premium received by him for such policy?

A. The insurer has the right to retain the premium, for (1) the words "at and from" San Francisco make the risk attach while the vessel is "at" San Francisco, and where the risk has once attached, no portion of the premium for that risk is returnable. See Arnould on Marine Insurance, 2d Edition p. 1208 (7th Edition paragraph 1247). See Arnould on Marine Insurance 2d Edition page 1213 (7th Edition paragraph 1251). 2 Marshall on Insurance 669. 2 Phillips on Insurance 1820. Moses v. Pratt, 4 Camp. 296. 2d (2) There is no authority for the proposition that the carriage of false papers avoids the policy in toto. It is not a "breach of warranty"

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in the technical sense. The decisions referred to in my answer to Direct Interrogatory No. 23 only show that the insurer is not liable for a loss occasioned by the ship-owners having done so. The result is that the insurer is and continues liable for all losses which are caused otherwise than by the carriage of false papers. For this additional reason, the insurer cannot be required to return the premium he has received.

13. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed?

A. My reply to this interrogatory is the same as my reply to the 12th interrogatory.

14. Q. Suppose a policy, of which Exhibit "A" is a copy, and containing the clause, "At and from San Francisco to Vladivostock," delivered to the insured on the 24th day of December, 1904, at which time the vessel insured is in the harbor of San Francisco, where she remains until December 31, 1904, when she sails on a voyage entirely different from that mentioned in the policy,—would the underwriter, under the law of Great Britain between December 1, 1904, and May 1, 1905, be entitled to retain the premium on the policy against the demand of the insured?

A. If while she was "at" San Francisco she was there in contemplation of the voyage mentioned in the policy, the policy would attach and there would be no return of premium even although the assured

subsequently changed his mind and sent her on a different voyage. If, however, the vessel while "at" San Francisco was there in contemplation of an entirely different voyage all through, then the policy would never attach, and the underwriter by the law of England would not be entitled to retain the premium.

15. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed? A. The same.

16. Q. Was carrying contraband to the Russians at war with Japan a legitimate action under the laws of England between December 1, 1904, and May 1, 1905? A. Yes.

17. Q. Was such carrying legitimate under the law of nations at that time?

A. Yes, subject to the belligerent's rights to capture and condemnation.

18. Q. Suppose a policy of which Exhibit "A" hereunto annexed is a copy; a clearance and sailing by the "M. S. Dollar" from San Francisco on a voyage to Moji, Japan; and a change of destination en route, to Vladivostock: What is the law of Great Britain with reference to such a state of facts as constituting an abandonment of or a failure to sail on the insured voyage?

A. By the law of England if the vessel really sailed for Moji, Japan, and not for Vladivostock, she did not sail on the insured voyage. If however, though her clearances and sailing were nominally for Moji, the intention throughout was to send her to

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Vladivostock, then she in fact sailed on the insured voyage. If the original intention was really to sail for Moji, and her destination was changed en route for Vladivostock, there was a failure to sail on the insured voyage. There having been a failure to sail on the insured voyage the "change of voyage" Clause in the policy would not take effect: See Simon Israel & Co. v. Sedgwick, Law Reports (1893), 1 Q. B. 303.

19. Q. If your answer to the last question be that such acts constitute an abandonment or a failure to sail on the insured voyage, state what is the law of Great Britain with reference to the liability of an insurer on such a policy?

A. If there was a failure to sail on the insured voyage, the insurer incurs no liability in respect of the voyage. Whether he would be entitled to retain his premium would depend on whether the risk had attached on the vessel while "at" San Francisco, before the information of the intention to send her to Moji instead of to Vladivostock. If she in fact sailed on the insured voyage, the insurer would incur liability in respect thereof, and there would of course be no return premium.

20. Q. What is the law of Great Britain with reference to the state of facts in the last two questions save that the policy is cast in the form of Exhibit "B" hereunto annexed? A. The same.

21. Q. Suppose a policy cast in the form of Exhibit "A" hereunto annexed, no clearance by the "M. S. Dollar" for Vladivostock at any time, a clearance for Moji, Japan, on December 31, 1904, and a

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sailing on that day: What is the law of Great Britain with reference to such a clearance for Moji, Japan, as a performance of the warranty to clear in such policy?

A. I think the clearance of 31st December, 1904, would satisfy the warranty, the material point of which is the date and not the port for which the vessel is nominally cleared.

22. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed? A. The same.

23. Q. Suppose the "M. S. Dollar" were sent to sea under a policy of which Exhibit "A" hereunto annexed is a copy, carrying a cargo in fact consigned to Vladivostock, a set of bills of lading for the cargo, with destination given as Vladivostock, and a set of similar bills of lading for said cargo giving as its destination Moji, Japan, a clearance for Moji, Japan, as the vessel's destination, whereas her destination and the destination of her cargo was Vladivostock, Russia; suppose that the vessel were captured by the Japanese then at war with Russia, that the captain of the "M. S. Dollar" presented to the captain of the Japanese man-of-war the false set of papers to Moji and did not present the true set of papers to Vladivostock, that the latter captain discovered the true destination of the vessel and cargo and that the vessel was subsequently condemned for carriage of such false papers with intent to evade capture; that there was no leave given to carry such false papers: what was the law of Great Britain between Decem-

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ber 1, 1904, and May 1, 1905, with reference to the liability of an insurer under such a policy for such a capture and condemnation?

A. It was stated by Arnould himself (2d Edition, pp. 733.734, reproduced in 7th Edition, paragraph 732) that, though it became necessary during the great French Wars to carry on trade with the Continent by the aid of simulated papers, "yet our Courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ships carrying simulated papers, were conclusive to discharge the underwriters from his liability except where there was an express leave given in the policy to carry them." Arnould gives as illustrations the cases of Horneyer v. Lushington, 15 East, 46, and Oswell v. Vigne, 15 East, 70, which fully bear out his statement. This view is borne out by Marshall on Insurance, 4th Edition, 137, Park 8th Edition, page 729, and Duer, Vol. 1, page 744, and has never been questioned in any reported case. My answer to this question is therefore that the insurer is not liable.

24. Q. What would your answer to the last question be in the event that it were also shown that the vessel sailed with a complete set of ship's papers giving as her destination Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, that the first set was to be presented in the event the vessel were overhauled by the Japanese and the second was to be presented if captured by the Russians, and that she was captured and condemned

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by the Japanese for having carried and used the first set to evade capture. A. The same.

25. Q. What would your answers to the last two questions be in the event it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers? A. The same.

26. Q. What would your answer to the last three questions be in the event that the policy were cast in the form of Exhibit "B" hereto annexed?

A. The same.

27. Q. Suppose the "M. S. Dollar" were captured and condemned by the Japanese for carrying and using false papers to evade capture on the voyage insured against in the policy of which Exhibit "A" is a copy, and it were shown that the fact of having such papers on board actually tended to decrease the risk of such loss: What was the law of Great Britain between December 1, 1904, and May 1, 1905, as to the liability of such insurer for such loss?

A. The same.

28. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed? A. The same.

Cross-interrogatives.

1. Q. Were you at any time counsel for the Maritime Insurance Company, Limited?

A. Yes, two or three times.

2. Q. Have you ever been in the employ of the Maritime Insurance Company, Limited, in any capa-

(Deposition of Ralph Iliff Simey.)

city, either directly or indirectly through an attorney or through an agent of said company?

A. No, except so far as appears from my answer to the preceding cross-interrogatory.

3. Q. If you shall say you have been so employed, state in what capacity and when.

A. As counsel two or three times in the last five years.

4. Q. Have you given said Maritime Insurance Company, Limited, or any attorney, or any agent for said company, an opinion upon the questions inquired of in the direct interrogatories attached to this commission? A. No.

5. Q. Have you received any fee or other compensation from said Maritime Insurance Company, Limited, or through an attorney, or through an agent employed by them, for any services in connection with the matters inquired of in the direct interrogatories attached to this commission?

A. No.

6. Q. Are you to receive any fee or other compensation from said Maritime Insurance Company, Limited, or from an attorney or from an agent employed by them for any services in connection with the questions inquired of in the direct interrogatories attached to this commission?

A. I expect to receive professional renumeration in connection with my answers to all these questions.

7. Q. In your practice have you ever seen a policy of insurance in all its terms the same as the policy of insurance marked Exhibit "A" and attached to the direct interrogatories?

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A. I cannot say—probably not.

8. Q. In your practice have you ever seen a policy of insurance in all its terms precisely the same as the policy of insurance marked Exhibit "B" and attached to the direct interrogatories?

A. Probably not.

9. Q. Are there not standard authorities on the law of marine insurance of Great Britain other than the 7th Edition of Arnould on Marine Insurance?

A. Yes.

10. Q. If in answer to the last cross-interrogatory you shall say that there are other standard authorities on the law of marine insurance, other than the 7th Edition of Arnould on Marine Insurance, name such authorities.

A. The six earlier editions of Arnould, especially the first two: Park, Marshall, and the American works, especially Phillips, Parsons & Duer. There are many other standard treatises on the law of Marine Insurance—see list of works of reference at the beginning of Vol. 1 of the 7th Edition of Arnould.

11. Q. Is the Commercial Court a court of last resort? A. No.

12. Q. Is it not a fact that in its methods and practice the Commercial Court does not follow the technical rules of law by which the Statutory Courts of England are bound?

A. In the so-called Commercial Court (which is not distinct from the High Court of Justice) arrangements are often made by which technical rules of practice and of evidence are waived or avoided.

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In other respects, the rules of law, technical or otherwise, followed by this Court are the same as are followed in every other Court.

13. Q. Do you not find in your practice frequent differences of opinion among practitioners at the bar of what the law of Great Britain is, as applied to any given state of facts? A. Yes.

14. Q. Is not the law of Great Britain determined by the decisions of the courts and by the statutes? A. Yes.

15. Q. In your practice before the English Courts have not the courts frequently determined the questions of law proposed by you, adversely to your contention? A. Yes.

16. Q. Do you know that the steamship "M. S. Dollar" at the time she was covered by the policy of insurance mentioned in the direct interrogatories attached to this commission, was also covered by a large number of policies issued by Lloyds and other insurance companies and underwriters in London, which said policies were in the same terms, and covered the same risks, as the policy issued by the Maritime Insurance Company, Limited, marked Exhibit "B" attached to the direct interrogatories, the aggregate of which insurance covered the sum of $170,000 in United States gold coin.

A. No.

17. Q. If in answer to the last preceding interrogatory you shall state that you do know such fact, state, if you know, whether or not all of the said insurance companies or underwriters took advice of

(Deposition of Ralph Iliff Simey.)

counsel in England as to their liability under said policies of insurance.

A. I answered the last preceding cross-interrogatory in the negative.

18. Q. If in answer to the 16th cross-interrogatory you shall say that you do know of the existence of such policies of insurance, state whether or not each and all of said insurance companies and underwriters paid the said M. S. Dollar Steamship Company in full under said policies as for a total loss.

A. I have answered the sixteenth cross-interrogatory in the negative.

19. Q. Do you not know that the Maritime Insurance Company, Limited, in many cases pending in England and growing out of war risk losses in the Russo-Japanese war, put in a defense of loss by simulated papers, and upon the advice of their solicitors paid said policies in full before trial?

A. No.

20. Q. The question as to whether or not simulated papers affect the risk is, like other questions, a question of fact, is it not?

A. The question as to whether an insurer is liable for a loss caused by confiscation of ship owing to her having carried simulated papers is a question not of fact, but of law. If the question were whether the Underwriter was entitled to avoid the policy on the ground that a material circumstance namely, the intention to carry simulated papers, had been concealed from him, the materiality of such circumstance would be a question of fact. In no other sense

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than this is the question whether or not simulated papers affect the risk one of fact.

21. Q. If in answer to the 10th direct interrogatory you shall say that, under the law of Great Britain there is no right to condemn the vessel, state whether or not you did not upon the 23rd day of July, 1907, state under oath before John Dalton Venn, a Notary Public, at Essex Hall, Strand, London, that you did not remember any case to that effect, and if you do so state, state by what means your recollection has been refreshed upon the subject.

A. In answer to the 10th direct interrogatory I stated that there is no right to condemn the vessel.

22. Q. Is it not a fact that all questions regarding condemnation by a Prize Court depend, for all practical purposes, on the law of the country in which the Court of Prize is sitting?

A. Yes, so far as the validity or invalidity of the condemnation is concerned, but not as to the results of the condemnation as between other parties.

23. Q. Is there anything that you know of, that binds a Court of Prize of a foreign country to follow the British law, or the British decisions, in dealing with captured property? A. No.

24. Q. If in answer to the 18th direct interrogatory you shall say that the matters therein inquired of constitute an abandonment and failure to sail on the insured voyage, state whether or not you mean thereby to convey the idea that such clearance and sailing constitutes what is technically known in insurance law as a "deviation."

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A. Not a deviation.

25. Q. State whether or not a mere intention to change the final destination without a departure from the route common to both ports of destination, is a deviation or abandonment and failure to sail on the insured voyage.

A. Not a deviation. But an intention (i. e., a resolution) not to proceed to the final destination named in the policy is (a) a failure to sail on the insured voyage if formed before the voyage has commenced, or (b) a change of voyage if formed after the voyage has commenced. In either case there is (a) a failure to sail on the insured voyage, or (b) a change of voyage, as soon as such intention is formed, and before the route common to both ports of destination is departed from. The expression "abandonment of voyage" is applied to both (a) and to (b).

26. Q. State whether or not a mere clearance for a port other than the port of destination without departure from the common route, is a deviation or an abandonment and failure to sail on the insured voyage. A. I think not.

27. Q. If in answer to the 18th direct interrogatory you shall say that the condition therein inquired of was an abandonment and failure to sail on the insured voyage, state whether or not you know how far and to what points a voyage from San Francisco to Moji, Japan, and a voyage from San Francisco to Vladivostock, are the same.

A. I do not know.

(Deposition of Ralph Iliff Simey.)

28. Q. If in answer to the 18th direct interrogatory you shall say the matter therein inquired of constituted an abandonment and failure to sail on the insured voyage, state whether or not the clearing or you had in mind as the place where said change of destination was made.

A. No place en route: San Francisco the terminus a quo.

29. Q. If in answer to the 18th direct interrogatory you shall say that the matter therein inquired of constitute an abandonment and failure to sail on the insured voyage, state whether or not you would so sailing with the intention to go to Moji, and the change of such intention en route and before a departure from the route common to both destination would constitute an abandonment or failure to sail on the insured voyage.

A. It would constitute a change of voyage, as distinct from a failure to sail on the insured voyage. "Abandonment of voyage" is an ambiguous expression which may be applied to either. The voyage is changed as soon as the intention to change it is formed, and before the route common to both destination is departed from.

30. Q. If in answer to the 18th direct interrogatory you shall say that the facts therein inquired of constitute an abandonment and failure to sail on the insured voyage, name all of the provisions of the policy Exhibit "A" and Exhibit "B" attached to said direct interrogatories which you consider material in arriving at said conclusion.

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A. The material provisions are the words defining the termini of the voyage, namely, "at and from San Francisco to Vladivostock."

31. Q. If in answer to the 18th direct interrogatory you shall say that the facts therein inquired of constitute an abandonment and failure to sail on the insured voyage, state what point or place on route consider it if the said port of Moji were a coaling of call en route to Vladivostock. A. No.

32. Q. If in answer to the 18th direct interrogatory you shall say that the facts therein inquired of constituted an abandonment and failure to sail on the insured voyage, state whether or not you would so consider it if the said port of Moji were a mere port port where the said vessel proposed to take on sufficient coal to enable her to proceed safely from Vladivostock to a safe neutral port.

A. No. If Moji were merely a place of call on the way to Vladivostock though out of the direct route thither, there would be no failure to sail on the insured voyage, nor an abandonment thereof.

33. Q. Is there any implied warranty to document or not to document a vessel in a contract of marine insurance?

A. There is no such "warranty" in the technical sense in which the word "warranty" is used as applied to contracts of marine insurance. There is, however, substantial authority for saying that in policies on ship there is an implied agreement that the vessel shall at the time of her seizure have on

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board all documents necessary to prove her national character. Breach, however, of this implied agreement does not entitle the insurer to avoid the policy for all purposes; it merely disentitles the assured to recover for a loss by capture and condemnation where the absence of such documents appears from the foreign sentence to have been the ground, or a ground, of such condemnation. See Arnould, 2d Edition, pages 728, 729 and 7th Edition, paragraphs 727 and 728.

34. Q. If in answer to the 23d direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. I have already given the authorities upon which I rely in my answer to the 23d direct interrogatory.

35. Q. If in answer to the 24th direct interrogatory you shall say that the insurer in not liable, give the authority upon which you rely for your said statement.

A. In reply to this 35th cross-interrogatory I refer to my answer to the 34th cross-interrogatory.

36. Q. If in answer to the 25th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. In reply to this 36th cross-interrogatory I refer to my answer to the 34th cross-interrogatory.

37. Q. If in answer to the 26th direct interroga-

tory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. In my reply to this 37th cross-interrogatory I refer to my answer to the 34th cross-interrogatory.

38. Q. If in answer to the 27th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. In my reply to this 38th cross-interrogatory I refer to my answer to the 34th cross-interrogatory.

39. Q. If in answer to the 28th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. In my reply to this 39th cross-interrogatory I refer to my answer to the 34th cross-interrogatory.

40. Q. Is there anything that you know of that binds a Prize Court of any country to follow the Law of Nations in dealing with captured property?

A. Usage and comity of nations coupled with a reluctance on the part of any civilized belligerent to give any unnecessary offense to friendly or non-hostile neutrals.

41. Q. Is there anything peculiar to the law of England relating to the term "warranted to clear on or before 31st January 1905, or held at a premium to be arranged"?

A. I am not aware of any, but I am not sufficiently acquainted with the law of other countries.

(Deposition of Ralph Iliff Simey.)

42. Q. State whether or not the phrase in the last cross-interrogatory referred to is a warranty with respect to anything other than to the time of the clearance.

A. I think the phrase is only a warranty as to the time of clearance.

43. Q. If in answer to the 12th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement.

A. I have already given the Authorities in my answer to the 12th direct interrogatory.

44. Q. If in answer to the 13th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement.

A. I have already given the Authorities in my answer to the 12th direct interrogatory.

45. Q. If in answer to the 14th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement.

A. The same authorities apply as are referred to in my answers to cross-interrogatories Nos. 43 and 44. To these let me add the authorities referred to in Arnould, 7th Edition, paragraph 475.

46. Q. If in answer to the 15th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement.

(Deposition of Ralph Iliff Simey.)

A. My reply to this 46th cross-interrogatory is the same as my reply to the last preceding cross-interrogatory.

47. Q. If in answer to the 18th direct interrogatory you shall say that the facts therein stated constituted an abandonment of, or failure to sail upon, the insured voyage, give the authority upon which you rely for your said statement.

A. In so far as I say that the facts constituted an abandonment of, or failure to sail upon, the insured voyage, the authority is Arnould (2d Edition), pp. 399 to 406 (reproduced in 7th Ed., paragraphs 383 to 386), and Simon Israel & Co. v. Sedgwick, Law Reports (1903) 1 Q. B. 303.

Redirect Interrogatories.

1. Q. Suppose an insurance against capture, seizure and detention covering a vessel on a voyage from San Francisco to Vladivostock, a port in Siberian Russia—that country being then at war with Japan—that the vessel actually clears from San Francisco for Moji and sails for Moji, a port in Japan, the captain en route changing the vessel's destination to Vladivostock, that cruisers of both warring nations are likely to overhaul the vessel on both the voyage to Vladivostock and the voyage to Moji: What is the law of Great Britain with reference to such a state of facts as constituting an abandonment of or a failure to sail on the insured voyage.

A. On the facts as stated there is a failure to sail on the insured voyage. This answer must however,

(Deposition of Ralph Iliff Simey.)

be read together with and is qualified by my answer to the 18th and 19th direct interrogatories.

2. Q. If in answer to the 16th cross-interrogatory you should say yes, state whether you know of your own knowledge whether Lloyds and the other insurance companies and underwriters therein referred to knew that the captain of the vessel had said that he sailed from the port of San Francisco on the said voyage, clearing for the port of Moji instead of the port of Vladivostock and intending at the time of sailing to go to the port of Moji as his destination.

A. I have not said yes.

3. Q. If in answer to the 16th cross-interrogatory you should say yes, state whether you know of your own knowledge whether Lloyds and the other insurance companies and underwriters therein referred to, knew that the captain of the "M. S. Dollar" had sailed on the said voyage with a complete set of ship's papers truly showing the destination of the vessel to be Vladivostock, Siberian Russia, and a complete set of ship's papers similar to the last save that the false destination of Moji, Japan, was named in said papers, and that when the "M. S. Dollar" was overhauled by the Japanese cruiser which subsequently took her to port, he failed to deliver the set of papers truly disclosing the destination of the vessel, but did present the papers falsely claiming Moji as the destination of the vessel, for the purpose of deceiving the said Japanese cruiser.

A. I have not said, yes.

(Deposition of Ralph Iliff Simey.)

4. Q. If in answer to said 16th cross-interrogatory you should say yes, state whether or not the policies referred to in said question, other than the Maritime Insurance Company's policies allowed the carriage of false papers, and whether to your knowledge the said companies had not verbally or otherwise granted the vessel the privilege of carrying false papers.

A. I have not said, yes.

5. Q. If in answer to the 17th cross-interrogatory you say yes, state how you know that of the said insurance companies all took advice of counsel in England as to their liability under said policies of insurance.

A. I have not said, yes.

6. Q. If in answer to the 17th cross-interrogatory you answer yes, state whether or not the said counsel knew the facts set forth in redirect interrogatories 2, 3 and 4.

A. I have not said, yes.

7. Q. If in answer to the 18th cross-interrogatory you shall say that each and all of the said insurance companies and underwriters aid the M. S. Dollar Steamship Company in full under said policies as for a total loss, state how you know that all so did, and whether you know of your own knowledge or by hearsay.

A. I have not said that the Insurance Companies and Underwriters paid.

8. Q. If in answer to the 19th cross-interrogatory you shall state that the Maritime Insurance

(Deposition of Ralph Iliff Simey.)

Company, Limited, did pay the policies referred to therein in full before trial, state whether or not the facts as known to the companies in those other cases were the same as the facts in this case.

A. I have not made the statement referred to.

9. Q. If in answer to the 19th cross-interrogatory you say yes, state whether the facts regarding the losses under the policies so paid in full were the same as set forth in redirect interrogatories 2, 3 and 4.

A. I have not said, yes.

10. Q. If in answer to the 16th, 17th, 18th or 19th cross-interrogatories you shall say yes, to each or to any one, state whether your answer of yes was in each case based upon your own knowledge or upon hearsay statements of other persons.

A. I have not said, yes.

11. Q. If in answer to the 32d cross-interrogatory you shall state that a sailing on voyage to Moji as destination is a sailing on a voyage to Vladivostock, state whether your answer would be the same if Moji were a port of Japan, a country at war with Russia, and the vessel had false papers on board when sailing and intended to use them to deceive the Japanese.

A. The hypothetical facts suggested would not alter my answer to the thirty-second cross-interrogatory and the 18th direct interrogatory.

Recross-interrogatory.

1. Q. If in answer to the 1st redirect interrogatory you shall say that the facts therein stated con-

(Deposition of Ralph Iliff Simey.)

stituted an abandonment of, or failure to sail upon, the insured voyage, give in detail your authority for that statement.

A. The authority consists of the passages from Arnould and the case referred to in my answer to the 47th cross-interrogatory. The whole of these answers are given with reference to the law as it stood prior to the 1st January, 1907, on which day the Marine Insurance Act, 1906, came into operation.

Deposition of John Andrew Hamilton, K. C.

Direct Interrogatories.

1. Q. What is your name and profession?

A. My name is John Andrew Hamilton, and I am by profession a Barrister-at-law and a King's Counsel.

2. Q. How long have you pursued that profession? A. About 25 years.

3. Q. Where did you prepare for the practice of the law?

A. In London principally, in the chambers of John Charles Bigham, Esq., then a practicing member of the Bar and now a Judge of the High Court of Justice.

4. Q. Are you a King's Counsellor?

A. Yes.

5. Q. Please describe the nature and functions of the office of King's Counsellor?

A. The appointment of one of his Majesty's Counsel is honorary. A King's Counsel enjoys professional precedence and pre-audience in Court ac-

(Deposition of John Andrew Hamilton.)

cording to the date of his Patent. He cannot appear against the Crown except by the Royal License.

6. Q. Before what courts does a King's Counsellor practice? A. All courts.

7. Q. By whom were you appointed to that office?

A. By His Majesty the King upon the advice of the Lord Chancellor.

8. Q. Have you had any experience in litigation involving the law of nations? If so what experience?

A. Yes in connection with ordinary mercantile litigation.

9. Q. Does your practice bring you much into litigation in the Commercial Court? A. Yes.

10. Q. What is the Commercial Court?

A. The Commercial Court is a popular expression for that list of actions set down for trial in the King's Bench Division of the High Court of Justice which is called the Commercial List, and is taken by such Judge or Judges of the King's Bench Division as may be assigned to try those actions from time to time.

11. Q. Over what cases has it jurisdiction?

A. Over all causes that may be transferred to it by order of the Judge in charge of the List.

12. Q. Has your practice in that court given you experience in questions of shipping, maritime commerce and insurance? A. Yes.

13. Q. If so, to what extent?

A. Ever since the Commercial List was instituted in 1895.

(Deposition of John Andrew Hamilton.)

14. Q. Have you had experience in that branch of the law in other courts? If so, to what extent?

A. Yes when such actions have not been transferred to the Commercial List, or when such questions have arisen otherwise than in actions in the King's Bench Division.

15. Q. Do you know that work entitled The Seventh Edition of Arnould on Marine Insurance, Edited by Messrs. E. L. De Hart and Ralph Iliff Simey? A. Yes.

16. Q. Is that work an authority on the law of marine insurance in Great Britain?

A. Yes, it is frequently cited as such in court.

17. Q. What can you say of its weight and value as an authority on that branch of the law?

A. Arnould on Marine Insurance is the most authoritative English work on Marine Insurance, and Messrs. De Hart and Simey have edited the 7th Edition which is the most recent edition.

18. Q. Do you know Ralph Iliff Simey, Esq.?

A. Yes.

19. Q. What can you say of his professional capacity with reference to his knowledge and experience in matters of the law of marine insurance of Great Britain?

A. Mr. Simey is a learned and experience lawyer, and one of the foremost living writers at the English bar on the English law of marine insurance.

20. Q. If a vessel carrying contraband to a belligerent port, where the cargo is not owned by the owner of the vessel and the owner of the vessel and

(Deposition of John Andrew Hamilton.)

its officers are in no way parties to any attempt to conceal its nature, is captured by the belligerent, what is the law of Great Britain with reference to the right to condemn the vessel for such carriage?

A. In the circumstances referred to in the question, the belligerent ought not to condemn the ship. His misconduct or unneutral behavior on the part of the owner of the ship, or endeavors to conceal the nature of the cargo or to defeat the belligerent's right of search, are the grounds upon which the vessel of a ship owner is condemned, when the ship owner is not also the owner of the cargo.

21. Q. What is the law of nations on the state of facts set forth in the last question?

A. So far as I know, the same.

22. Q. If, while under a policy of which Exhibit "A" hereunto annexed is a copy, a vessel is condemned for carrying false papers, whereby is defeated the owner's right to recover from the underwriter, what was the law of Great Britain between December 1, 1904, and May 1, 1905, with regard to the right of the insurer on such a policy to retain the premium received by him for such policy?

A. There would be no return of premium of all if the risk had once attached, and, so far as the wording of the policy goes the risk would attach at San Francisco before the vessel proceeded on her voyage even though she carried false papers.

23. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed? A. The same.

(Deposition of John Andrew Hamilton.)

24. Q. Suppose a policy, of which Exhibit "A" is a copy, and containing the clause, "At and from San Francisco to Vladivostock," delivered to the insured on the 24th day of December, 1904, at which time the vessel insured is in the harbor of San Francisco, where she remains until December 31, 1904, when she sails on a voyage entirely different from that mentioned in the policy—would the underwriter, under the law of Great Britain between December 1, 1904, and May 1, 1905, be entitled to retain the premium on the policy against the demand of the insured?

A. If she was at San Francisco but it could be proved that in fact she was not there in contemplation of a voyage to Vladivostock at all, the policy would not attach and the premium would be returnable, but otherwise if she was there in contemplation of such a voyage, for however short a time, it would attach and the premium would not be returnable.

25. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed? A. The same.

26. Q. Was carrying contraband to the Russians at war with Japan a legitimate action under the laws of England between December 1, 1904, and May 1, 1905? A. Yes.

27. Q. Was such carrying legitimate under the law of nations at that time? A. Yes.

28. Q. Suppose a policy of which Exhibit "A" hereunto annexed is a copy; a clearance and sailing

(Deposition of John Andrew Hamilton.)

by the "M. S. Dollar" from San Francisco on a voyage to Moji, Japan; and a change of destination en route, to Vladivostock: What is the law of Great Britain with reference to such a state of facts as constituting an abandonment of, or failure to sail on the insured voyage?

A. If she clears and sails from San Francisco for Moji as her real destination she has failed to sail on the insured voyage, for under the policy referred to Vladivostock is the destination.

29. Q. If your answer to the last question be that such acts constitute an abandonment or a failure to sail on the insured voyage, state what is the law of Great Britain with reference to the liability of an insurer on such a policy?

A. Thereafter the Underwriters are not liable on the policy, for the voyage to Moji as the destination is not covered and the marginal clause as to the deviation or change of voyage does not take effect in the event mentioned in the question.

30. Q. What is the law of Great Britain with reference to the state of facts in the last two questions save that the policy is cast in the form of Exhibit "B" hereunto annexed?

A. The same.

31. Q. Suppose a policy cast in the form of Exhibit "A" hereunto annexed, no clearance by the "M. S. Dollar" for Vladivostock at any time, a clearance for Moji, Japan, on December 31, 1904, and a sailing on that day: What is the law of Great Britain with

(Deposition of John Andrew Hamilton.)

reference to such a clearance for Moji, Japan, as a performance of the warranty to clear in such policy?

A. The warranty is satisfied. The warranty is to clear, not to clear for Vladivostock before the named date.

32. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed?

A. The same.

33. Q. Suppose the "M. S. Dollar" were sent to sea under a policy of which Exhibit "A" hereunto annexed is a copy, carrying a cargo in fact consigned to Vladivostock, a set of bills of lading for the cargo, with destination given as Vladivostock, and a set of similar bills of lading for said cargo giving as its destination Moji, Japan, a clearance for Moji, Japan, as the vessel's destination, whereas her destination and the destination of her cargo was Vladivostock, Russia; suppose that the vessel were captured by the Japanese then at war with Russia, that the captain of the "M. S. Dollar" presented to the captain of the Japanese man-of-war the false set of papers to Moji, and did not present the true set of papers to Vladivostock, that the captain discovered the true destination of the vessel and cargo and that the vessel was subsequently condemned for carriage of such false papers with intent to evade capture; that there was no leave given to carry such false papers: What was the law of Great Britain between December 1, 1904, and May 1, 1905, with reference to the liability

(Deposition of John Andrew Hamilton.)

of an insurer under such a policy for such a capture and condemnation?

A. The insurer is not liable.

34. Q. What would your answer to the last question be in the event that it were also shown that the vessel sailed with a complete set of ship's papers giving as her destination Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia; that the first set was to be presented in the event the vessel were overhauled by the Japanese and the second was to be presented if captured by the Russians, and that she was captured and condemned by the Japanese for having carried and used the first set to evade capture?

A. The same.

35. Q. What would your answers to the last two questions be in the event it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers?

A. The same.

36. Q. What would your answers to the last three questions be in the event that the policy were cast in the form of Exhibit "B" hereunto annexed?

A. The same.

37. Q. Suppose the "M. S. Dollar" captured and condemned by the Japanese for carrying and using false papers to evade capture on the voyage insured against in the policy of which Exhibit "A" is a copy, and it were shown that the fact of having

(Deposition of John Andrew Hamilton.)

such papers on board actually tended to decrease the risk of such loss: What was the law of Great Britain between December 1, 1904, and May 1, 1905, as to the liability of such insurer for such loss?

A. The same.

38. Q. What would your answer to the last question be if the policy were cast in the form of Exhibit "B" hereunto annexed?

A. The same.

Cross-interrogatories.

1. Q. Were you at any time counsel for the Maritime Insurance Company, Limited?

A. I have occasionally been briefed in actions on behalf of the Maritime Insurance Company, Limited.

2. Q. Have you ever been in the employ of the Maritime Insurance Company, Limited, in any capacity, either directly, or indirectly through an attorney or through an agent of said company?

A. No.

3. Q. If you shall say you have been so employed, state in what capacity, and when.

A. I answered the second cross-interrogatory in the negative.

4. Q. Have you given said Maritime Insurance Company, Limited, or any attorney, or any agent for said company, an opinion upon the questions inquired of in the direct interrogatories attached to this commission?

A. No.

5. Q. Have you received any fee or other compensation from said Maritime Insurance Company,

(Deposition of John Andrew Hamilton.)

Limited, or through an attorney or through an agent employed by them, for any services in connection with the matters inquired of in the direct interrogatories attached to this commission?

A. No.

6. Q. Are you to receive any fee or other compensation from said Maritime Insurance Company, Limited, or from an attorney, or from an agent employed by them for any services in connection with the questions inquired of in the direct interrogatories attached to this commission?

A. I expect to receive a proper professional fee for qualifying to give and for giving testimony in this cause as an expert witness.

7. Q. In your practice have you ever seen a policy of insurance in all its terms the same as the policy of insurance marked Exhibit "A" and attached to the direct interrogatories?

A. I cannot say that I have seen a policy in all its terms the same as Exhibit "A," but I am familiar with policies substantially in the same terms.

8. Q. In your practice, have you ever seen a policy of insurance in all its terms precisely the same as the policy of insurance marked Exhibit "B" and attached to the direct interrogatories?

A. My answer to this cross-interrogatory is the same as to the last preceding cross-interrogatory.

9. Q. Are there not standard authorities on the law of Marine Insurance of Great Britain other than the seventh Edition of Arnould on Marine Insurance? A. Yes.

(Deposition of John Andrew Hamilton.)

10. Q. If in answer to the last cross-interrogatory you shall say that there are other standard authorities on the law of Marine Insurance other than the 7th Edition of Arnould on Marine Insurance, name such authorities.

A. For example, Parke, Marshall, McArthur, Chalmers and the Editions of Arnould, prior to the 7th.

11. Q. Is the Commercial Court a court of last resort? A. No.

12. Q. Is it not a fact that in its methods and practice, the Commercial Court does not follow the technical rules of law by which the Statutory Courts of England are bound?

A. Causes tried in the Commercial List are, except insofar as the rules are varied by consent or by usage founded on consent of the parties, liable to be tried by the same rules of law as are applicable to other causes tried in the King's Bench Division of the High Court of Justice.

13. Q. Do you not find in your practice frequent differences of opinion among practitioners at the bar of what the law of Great Britain is, as applied to any given state of facts? A. Yes.

14. Q. Is not the law of Great Britain determined by the decisions of the courts and by the statutes. A. Yes.

15. Q. In your practice before the English Courts have not the courts frequently determined the questions of law proposed by you, adversely to your contention? A. Yes.

(Deposition of John Andrew Hamilton.)

16. Q. Do you know that the steamship "M. S. Dollar" at the time she was covered by the policy of insurance mentioned in the direct interrogatories attached to this commission, was also covered by a large number of policies issued by Lloyds and other insurance companies and underwriters in London, which said policies were in the same terms and covered the same risks as the policy issued by the Maritime Insurance Company, Limited, marked Exhibit "B," attached to the direct interrogatories, the aggregate of which insurance covered the sum of $170,000 in United States gold coin? A. I do not.

17. Q. If in answer to the last preceding cross-interrogatory you shall state that you do know such fact, state, if you know, whether or not all of the said insurance companies or underwriters took advice of counsel in England as to their liability under said policies of insurance. A. This does not arise.

18. Q. If in answer to the 16th cross-interrogatory you shall say that you do know of the existence of such policies of insurance, state whether or not each and all of said insurance companies and underwriters paid the said M. S. Dollar Steamship Company in full under said policies as for a total loss. A. This does not arise.

19. Q. Do you not know that the Maritime Insurance Company, Limited, in many cases pending in England and growing out of war risk losses in the Russo-Japanese war, put in a defense of loss by simulated papers, and upon the advice of their solicitors paid said policies in full before trial?

(Deposition of John Andrew Hamilton.)

A. I do not.

20. Q. The question as to whether or not simulated papers affect the risk is, like other questions, a question of fact, is it not?

A. Whether carrying simulated papers affects the liability of underwriters is a question of law. The legal effect upon the risk of the fact of carrying simulated papers is a question of law. If by the expression "affect the risk" some business consideration different from the legal effect of the fact is meant I do not know that I am competent to answer. Whether in a given case their carriage had actually made the voyage more risky is a question of fact.

21. Q. If in answer to the 20th direct interrogatory you shall say that under the law of Great Britain there is no right to condemnation, state whether or not you did not upon the 23d day of July, 1907, state under oath before John Dalton Venn, a Notary Public, at Essex Hall, Strand, London, that you did not remember any case to that effect, and if you did so state, state by what means your recollection has been refreshed upon the subject.

A. I have no recollection of the statement referred to, and no copy of it is produced before me.

22. Q. Is it not a fact that all questions regarding condemnation by a Prize Court depend, for all practical purposes, on the law of the country in which the Court of Prize is sitting? A. Yes.

23. Q. Is there anything that you know of that binds a Court of Prize of a foreign country to follow

(Deposition of John Andrew Hamilton.)

the British law, or the British decisions in dealing with captured property? A. No.

24. Q. If in answer to the 28th direct interrogatory you shall say that the matters therein inquired of constitute an abandonment and failure to sail on the insured voyage; state whether or not you mean thereby to convey the idea that such clearance and sailing constitutes what is technically known in insurance law as "deviation." A. No.

25. Q. State whether or not a mere intention to change the final destination without a departure from the route common to both ports of destination, is a deviation or abandonment and failure to sail on the insured voyage.

A. It is not a deviation: It is a change of voyage. The intention must not be a mere speculation; it must be a resolution. If it exists before sailing, the ship fails to sail on the insured voyage. If it only comes into existence after sailing, the voyage is changed.

26. Q. State whether or not a mere clearance for a port other than the port of destination without a departure from the common route, is a deviation or an abandonment and failure to sail on the insured voyage. A. No.

27. Q. If in answer to the 28th direct interrogatory you shall say that the condition therein inquired of was an abandonment and failure to sail on the insured voyage, state whether or not you know how far and to what points a voyage from San Francisco to Moji, Japan, and a voyage from San Francisco to Vladivostock, are the same?

(Deposition of John Andrew Hamilton.)

A. I do not know.

28. Q. If in answer to the 28th direct interrogatory you shall say that the matter therein inquired of constituted an abandonment and failure to sail on the insured voyage, state what point or place en route you had in mind as the place where the said change of desination was made.

A. I referred to an intention formed and entertained at San Francisco.

29. Q. If in answer to the 28th direct interrogatory you shall say that the matter therein inquired of constituted an abandonment and failure to sail on the insured voyage, state whether or not the clearing or sailing with the intention to go to Moji, and the change of such intention en route and before a departure from the route common to both destinations would constitute an abandonment or failure to sail on the insured voyage.

A. Yes, if the vessel clears and sails from San Francisco under the intention to make Moji her real destination she never sails on the voyage insured under the policy, and the change of intention en route, wherever exactly made, is immaterial.

30. Q. If in answer to the 28th direct interrogatory you shall say that the facts therein inquired of constitute an abandonment and failure to sail on the insured voyage, name all the provisions of the policy Exhibit "A" and Exhibit "B" attached to said direct interrogatories which you consider material in arriving at said conclusion.

A. At and from San Francisco to Vladivostock.

(Deposition of John Andrew Hamilton.)

31. Q. If in answer to the 28th direct interrogatory you shall say that the facts therein inquired of constitute and abandonment and failure to sail on the insured voyage, state whether or not you would so consider it if the said port of Moji were a mere port of call en route to Vladivostock? A. No

32. Q. If in answer to the 28th direct interrogatory you shall say that the facts therein inquired of constitute and abandonment and failure to sail on the insured voyage, state whether or not you would so consider it if the said port of Moji were a coaling port where the said ship proposed to take on sufficient coal to enable her to proceed safely from Vladivostock to a safe neutral port? A. No.

33. Q. Is there any implied warranty to document or not to document a vessel, in a contract of marine insurance.

A. Not in the technical sense of the word "warranty" as used in marine insurance, but if the assured has not documented his ship properly and he loses her for that reason, that loss cannot be recovered against the underwriters as it is directly due to the assured's own acts, and is not within the indemnity contained in the policy.

34. Q. If in answer to the 33d direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement.

A. Horneyer v. Lushington, reported in 15 East, page 46, and Oswell v. Vigne, reported in 15 East, page 70, decisions of Lord Ellenborough, never over-

(Deposition of John Andrew Hamilton.)

ruled or questioned in any decided case, and therefore binding authorities as the law at present stands.

35. Q. If in answer to the 34th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement. A. The same.

36. Q. If in answer to the 35th direct interrogatory you shall say that the insured is not liable, give the authority upon which you rely for your said statement? A. The same.

37. Q. If in answer to the 36th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement. A. The same.

38. Q. If in answer to the 37th direct interrogatory you shall say that the insurer is not liable, give the authority upon whihc you rely for your said statement. A. The same.

39. Q. If in answer to the 38th direct interrogatory you shall say that the insurer is not liable, give the authority upon which you rely for your said statement. A. The same.

40. Q. Is there anything that you know of that binds a Prize Court of any country to follow the Law of Nations, dealing with captured property?

A. Only the feeling among trained Lawyers that existing rules and usages should be followed, and the fear of all belligerents of provoking hostilities with neutrals, or prejudicing their own interests when neutrals in their turn in a future war.

(Deposition of John Andrew Hamilton.)

41. Q. Is there anything peculiar to the law of England relating to the term "warranted to clear on or before 31st January, 1905, or held at a premium to be arranged?"

A. I only know English Law, and the question whether there is anything peculiar to English law implies comparison of English law with some other law.

42. Q. State whether or not the phrase in the last cross-interrogatory referred to is a warranty with respect to anything other than to the time of clearance. A. I think not.

43. Q. If in answer to the 22d direct interrogatory you shall say that the insurer is entitled to retain his premium give the authority upon which you rely for your said statement.

A. Arnould on Marine Insurance, 7th Edition, section 1247 to 1251, and the Cases there referred to.

44. Q. If in answer to the 23d direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement.

A. The same.

45. Q. If in answer to the 24th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement. A. The same.

46. Q. If in answer to the 25th direct interrogatory you shall say that the insurer is entitled to retain his premium, give the authority upon which you rely for your said statement. A. The same.

(Deposition of John Andrew Hamilton.)

47. Q. If in answer to the 28th direct interrogatory you shall say that the facts therein stated constitute an abandonment of, or failure to sail upon, the insured voyage, give the authority upon which you rely for your said statement.

A. Arnould on Marine Insurance, 7th Edition, sections 382 to 386, and the authorities there cited.

Redirect Interrogatories.

1. Q. Suppose and insurance against capture, seizure and detention covering a vessel on a voyage from San Francisco to Vladivostock, a port in Siberian Russia,—that country being then at war with Japan—that the vessel actually clears from San Francisco for Moji and sails for Moji, a port in Japan, the captain en route changing the vessel's destination to Vladivostock, that cruisers of both waring nations are likely to overhaul the vessel on both the voyage to Vladivostock and the voyage to Moji: What is the law of Great Britain with reference to such a state of facts as constituting an abandonment of or a failure to sail on the insured voyage?

A. If when she clears and sails from San Francisco for Moji the real destination is Moji, she fails to sail on the insured voyage the underwriters thereafter are not liable for her loss on the actual voyage, nor does the Captain's change of destination en route bring the liability of the underwriters into existence again.

2. Q. If in answer to the 16th cross-interrogatory you should say yes, state whether you know of

(Deposition of John Andrew Hamilton.)

your own knowledge whether Lloyds and the other insurance companies and underwriters therein referred to knew that the captain of the vessel had said that he sailed from the port of San Francisco on the said voyage, clearing for the port of Moji instead of the port of Vladivostock, and intending at the time of sailing to go to the port of Moji as his destination.

A. I do not know.

3. Q. If in answer to the 16th cross-interrogatory you should say yes, state whether you know of your own knowledge whether Lloyds and the other insurance companies and underwriters therein referred to knew that the captain of the "M. S. Dollar" had sailed on the said voyage with a complete set of ship's papers truly showing the destination of the vessel to be Vladivostock, Siberian Russia, and a complete set of ship's papers similar to the last save that the false destination of Moji, Japan, was named in said papers, and that when the "M. S. Dollar" was overhauled by the Japanese cruiser which subsequently took her to port, he failed to deliver the set of papers truly disclosing the destination of the vessel, but did present the papers falsely claiming Moji as the destination of the vessel, for the purpose of deceiving the said Japanese cruiser.

A. I do not know.

4. Q. If in answer to said 16th cross-interrogatory you should say yes, state whether or not the policies referred to in said question, other than the Maritime Insurance Company's policies, allowed the

carriage of false papers, and whether to your knowledge the said companies had not verbally or otherwise granted the vessel the privilege of carrying false papers. A. I do not know.

5. Q. If in answer to the 17th cross-interrogatory you say yes, state how you know that of the said insurance companies, all took advice of counsel in England as to their liability under said policies of insurance.

A. I do not know anything about it.

6. Q. If in answer to the 17th cross-interrogatory you answer yes, state whether or not the said counsel knew the facts set forth in redirect interrogatories 2, 3 and 4.

A. I do not know anything about it.

7. Q. If in answer to the 18th cross-interrogatory you shall say that each and all of the said insurance companies and underwriters paid the M. S. Dollar Steamship Company in full under said policies as for a total loss, state how you know that all so did, and whether you know of your own knowledge or by hearsay.

A. I do not know anything about it.

8. Q. If in answer to the 19th cross-interrogatory you shall state that the Maritime Insurance Company, Limited, did pay the policies referred to therein in full before trial, state whether or not the facts as known to the companies in those other cases were the same as the facts in this case.

A. I do not know anything about it.

(Deposition of John Andrew Hamilton.)

9. Q. If in answer to the 19th cross-interrogatory you say yes, state whether the facts regarding the losses under the policies so paid in full were the same as set forth in redirect interrogatoris 2, 3 and 4.

A. I do not know anything about it.

10. Q. If in answer to the 16th, 17th, 18th or 19th cross-interrogatory you shall say yes to each or to any one, state whether your answer of yes was in each case based upon your own knowledge or upon hearsay statements of other persons.

A. I have no knowledge of any kind about it.

11. Q. If in answer to the 32d cross-interrogatory you shall state that a sailing on voyage to Moji as destination is a sailing of a voyage to Vladivostock, state whether your answer would be the same if Moji were a port of Japan, a country at war with Russia, and the vessel had false papers on board when sailing and intended to use them to deceive the Japanese.

A. This question does not arise.

Recross-interrogatory.

1. Q. If in answer to the first redirect interrogatory you shall say that the facts therein stated constituted an abandonment of, or failure to sail upon, the insured voyage, give in detail your authority for that statement.

A. My answer is the result of the application of the rules laid down in Arnould on Marine Insurance under the headings "Deviation" and "Change of Voyage," where the authorities are collected, but a

recent and useful authority is to be found in a case in which I was engaged as counsel, namely, Simon Israel and Company v. Sedgwick, in the Court of Appeal, and reported in Law Reports (1893), 1 Q. B. 303.

[Exhibit "A" to Depositions of Simey and Hamilton.]

(Stamp 5 shillings) (Stamp 2 s 6 d.)

7/6

HULL.

MARITIME INSURANCE COMPANY Limited

London Agency.

London Agency:
60 Cornhill, E. C.

Agent:
William Armit.

Bankers:
Robarts, Lubbock & Co.

Directors:
Edward H. Cookson,
Chairman.

J. F. Caroe,
Deputy Chairman.

Arthur W. Bibby.
J. Kirke Crooks.
Rowland E. L. Naylor.
William S. Patterson.
Joshua Sing.

HEAD OFFICE:
Liverpool,
Brown's Building.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's, Castle St. Branch.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicholson,

No. 40/37804 L'pool A/c £ 3000.

The risk not to commence before the expiration of the previous policies.

In the event of the Vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and/or dry Dock or Docks during the currency of this Policy.

~~General Average payable as per Foreign~~ Custom, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

The warranty and Conditions as to average under three per cent to be applicable to such voyage, as if separately insured, ~~and not to the whole time thereon.~~

Stet, but so far as war risk is concerned only.

(Stamp)

WHEREAS it hath been proposed to the MARITIME INSURANCE COMPANY LIMITED by M. S. DOLLAR STEAMSHIP CO. as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay the said Company the sum of seven hundred and eighty-seven pounds 10/— as a premium at and after the rate of Twenty-five guineas per Cent. for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Three Thousand pounds, and promises and agrees with the Insured their Executors Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from SAN FRANCISCO to VLADIVOSTOCK, while there and thence back to a safe neutral port.

To return £5 per cent for loading on or before 31st December 1904.

To return £5 per cent for no claim under this policy.

Warranted to clear on or before 31st January 1905 or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the Warranted free of capture seizure & detention clause in Marine policy or policies.

With liberty to run blockade.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows:

Valued at £

ON HULL AND MATERIALS,
Valued at £..... £ 37050

MACHINERY AND BOILERS,
& everything connected therewith
of the ship or Vessel called the "M. S. Dollar" whereof ———— is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of ———— after such mooring, or until sailing on next voyage whichever may first occur. AND that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. AND in case of any Loss or Misfortune it shall be lawful to the insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance. AND it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or

Preserving the property Insured shall not be considered a waiver or acceptance of abandonment.

IN WITNESS WHEREOF the undersigned on behalf of the said Company according to the articles of Association of the said Company and a resolution duly passed by their Board of Directors have hereunto set their hands in LONDON, the twenty-second day of December, 1904.

Examined

W. ARMIT,
Agent in London.

W. ARMIT.

Endorsed: 86564.

No. 40/37804 L'pool A/c

It is requested that in case of damage which may involve a claim under this policy, notice when practicable, be given to Underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.
MARITIME INSURANCE COMPANY, LIMITED, Liverpool.

London 22/12 1904.

Assured—M. S. Dollar S. S. Co. Ld.

Ship—M. S. Dollar.

Voyage—Frisco to Vladivostock.

ON HULL.

£ 3000 at 25 gs. per cent.

NOTICE.—The insured are particularly requested to read their Policies.

Claimed hereon December sailing

£3000 at 5%	£150.00
10%	15.00
	£135.00

Settled 5 May /05

Maritime Insurance Co. Ltd.

A. ARMIT, London.

(Registered for Enclosure to Robert Dollar Co. from C. T. Bowring & Co. (Insurance), Limited, London.)

[Exhibit "B" to Depositions of Simey and Hamilton.]

(Stamp 5 Shillings) (Stamp—2 s 6 d)

HULL.

MARITIME INSURANCE COMPANY Limited

London Agency.

London Agency:
80 Cornhill, E. C.

Agent:
William Armit.

Bankers:
Robarts, Lubbock & Co.

Directors:
Edward H. Cookson,
Chairman.

J. F. Caroe,
Deputy Chairman.

Arthur W. Bibby.
J. Kirke Crooks.
William S. Patterson.
Joshua Sing.

HEAD OFFICE:
Liverpool,
Brown's Building.

BANKERS:
Liverpool—
North & South Wales Bank, Ltd.
Leyland's Castle St. Branch.

UNDERWRITER:
Harold Sumner.

SECRETARY:
J. C. Nicholson.

No. 40/37804 L'pool A/C £ 3000.

The risk not to commence before the expiration of the previous policies.

General Average Payable as per Foreign Custom, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

W. ARMIT.

The warranty and Conditions as to average under three per cent to be applicable to each Voyage, as if separately insured, and not to the whole time thereon.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any wet and/or dry Dock or Docks during the currency of this Policy.

WHEREAS it hath been proposed to the MARITIME INSURANCE COMPANY LIMITED by M. S. DOLLAR STEAMSHIP CO. as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this policy promising to pay the said Company the sum of seven hundred and eighty-seven pounds 10/— as a premium at and after the rate of Twenty-five guineas per cent for such insurance the said Company takes upon itself the burthen of such Insurance to the amount of Three thousand pounds and promises and agrees with the Insured their Executors Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an insurance (lost or not lost) at and from San Francisco to Vladivostock while there and thence back to a safe neutral port. To return £5 per cent for loading on or before 31st December 1904. To return £ 5 per cent for no claim under this policy.

Warranted to clear on or before 31st January, 1905, or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the warranted free of capture seizure & detention clause in Marine policy or policies.

With liberty to run blockades.

(Stamp)

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows:

	Valued at £
On Hull and Materials valued at £ ———	
Machinery and boilers " " £ ———	
	£37050

& everything connected therewith
of the Ship or Vessel called the M. S. Dollar whereof ——— is at present Master or whoever shall go for Master in the said Ship or Vessel.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above mentioned place of Destination and while there however employed until the expiry of ——after such mooring, or until sailing on next Voyage whichever may first occur. AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. ~~AND touching the adventures and perils which the said Company~~ is contented to bear and does take upon ~~itself~~ in the Voyage so insured as ~~aforesaid~~ they are of the Seas men of War Fire ~~Enemies~~ Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals ~~Takings at Sea Arrests Restraints and De-~~

~~tainments of all Kings Princes and People of what~~ Nation Condition or Quality soever ~~Barratry~~ of the Master and Mariners ~~and of~~ all other Perils Losses and Misfortunes ~~that~~ have or shall come to the Hurt ~~Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof.~~ AND in case of any loss or misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance ~~the charge whereof the said Company will bear in proportion to the sum hereby Insured.~~ AND it is expressly declared and agreed that the acts of the Insurer or Insured in Recovering Saving or Preserving the property insured shall not be considered a waiver or acceptance of abandonment. ~~AND it is further agreed, that if the Ship hereby insured shall come into collision with any~~ other ship or vessel, and the Insurer shall in consequence thereof become liable to pay and shall pay to the persons interested in such other Ship or Vessel or in the freight thereof or in the goods or effects on board thereof any sum or sums of money not exceeding the value of the Ship hereby insured calculated at the rate of eight pounds per ton on her registered tonnage this Company will pay the Insured such proportion of three-fourths of the sums so paid as the sum hereby Insured bears to the value of the Ship hereby Insured calculated at the rate of eight pounds per ton or if the value hereby declared amounts to a larger sum then to such declared value and in cases where the liability of the Ship has been contested without consent in writing this Company will also pay a like proportion of three-fourth part of the ~~costs thereby incurred or paid provided also that this~~

~~clause shall in no case extend to any sum which the~~ Insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever. AND it is declared and agreed that the Ship shall be and is warranted free from average under Three Pounds per ~~centum unless general or the Ship be stranded sunk or burnt.~~

~~Warranted free of capture seizure and detention~~ and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike ~~operations whether before or after declaration of war.~~

IN WITNESS WHEREOF the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto set their hands in LONDON, the twenty-second day of December, 1904.

W. ARMIT,
Agent in London.

Examined
W. ARMIT.

Endorsed:

No. 40/37804 L'pool a/c.

It is requested that in case of damage which may involve a claim under this policy, notice when practicable, be given to underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.

MARITIME INSURANCE COMPANY, LIMITED, Liverpool.

London 22/12 1904.

Assured—M. S. Dollar S. S. Co. Ltd.

Ship—M. S. Dollar.

Voyage—Frisco to Vladivostock.

On Hull

£3000 a 25 gs. per cent.

NOTICE.—The insured are particularly requested to read their policies.

Claimed hereon December sailing.

£3000 at 5% £150.00
10% 15.00

£135.00

Settled 5 May /05

Maritime Insurance Co. Ltd.

A. ARMIT, London.

(Registered for enclosure to Robert Dollar Co., from C. T. Bowring & Co. (Insurance) Limited, London.

Pay to the order of C. T. Bowring & Co. Insurance, Ltd.

M. S. DOLLAR SS. CO.,
By ROBERT DOLLAR, Pres.

[Opinion in Horneyer vs. Lushington.]

Mr. DENMAN.—If the Court please, under the defense by which we maintain that the policy, the execution of which is admitted, was in fact executed in London, we desire to offer further evidence showing the condition of the law of Great Britain, they being the cases cited by the British counsel in the deposition we read yesterday. I offer in evidence the case of Horneyer vs. Lushington, 15 East Reports, commencing on page 46, and extending through to page 52; and the case of Oswell and Another vs. Vigne, commencing on page 70 of the same report, and ending on page 77—being the cases cited by the British counsel in the depositions we read yesterday.

Mr. Denman read as follows:

HORNEYER vs. LUSHINGTON.

King's Bench. January 28, 1812.

Where immediately upon the arrival of a ship at Riga, her papers were taken and her hatches sealed

down by the officers of government, and so kept till her papers were sent to St. Petersburgh to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers; held, that this was not a mooring 24 hours in safety after her arrival, within those words in the policy. But that as the ship had no leave to carry simulated papers, although without such she would certainly have been seized and condemned, as coming from an enemy's country; the underwriters were not liable for the loss which ensued from the act of the assured himself. A policy of insurance on goods "at and from Gottenburg to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburgh," will not cover goods previously loaded on board at London, which arrived in the ship at Gottenburgh.

Assumpsit on a policy of assurance, "lost or not lost, at and from Gottenburgh to Riga, or at any ports in the Baltic upon goods and ship Amelia; beginning the adventure upon the goods from the loading thereof abroad the said ship at Gottenburgh"; with a memorandum declaring the insurance to be 3,500£ on the cargo, and 1,000£ on the ship. The declaration, after setting forth the policy (which did not contain any liberty to carry simulated papers) averred that on the 13th of September, 1809, the ship was in good safety at Gottenburgh, and that the cargo in the policy and memorandum mentioned was of great value; and that afterwards the ship, with

the cargo, set sail from Gottenburgh, and arrived at Riga, where, with the cargo, she was taken, arrested, restrained, and detained, by the Emperor of Russia, and wholly lost. The declaration also contained the usual money counts. At the trial, before Lord Ellenborough, C. J., at the London sittings after last Trinity term, it appeared that the goods insured were laden on board the ship in the port of London. She sailed with a license, and took on board simulated papers representing that she came from Berghen in Norway (Sweden being then at war with Russia). She arrived at Gottenburgh, from whence, after receiving orders, she proceeded to and arrived at Riga, where her papers were taken, and her hatches immediately sealed down by the government officers until her papers could be sent to St. Petersburgh to be examined; and on such examination, orders were immediately sent to Riga to seize the ship and cargo; which was done, and she was afterwards condemned, with her cargo, on the ground of having simulated papers on board. This, Lord Ellenborough held, was not a mooring twenty-four hours in safety, there having been an incipient seizure immediately on her arrival, which ended in her condemnation. And the case of Waples v. Eames (a) was cited; where Lord C. J. Lee had ruled that "moored twenty-four hours in good safety, meant such mooring as gave the ship the opportunity of unloading and discharging her cargo." At the same time the case of Bell v. Bell (b) was also mentioned. It was then objected, on the part of the defendant,

that the policy containing no leave to carry simulated papers, and the ship, notwithstanding, having carried them, and been condemned on that very ground, the plaintiff could not recover for a loss of which he himself had been the efficient cause. To which it was answered, that as the ship and cargo must necessarily have been confiscated if she had gone to Riga without simulated papers (Sweden being at war with Russia), the carrying of them was for the protection of the risk, and for the benefit of the insurer; and, therefore, within the general scope of the policy, though not within the particular words of it; in like manner as hoisting the enemy's flag, in sight of the enemy, in endeavoring to avoid capture is no fraud upon the underwriters. It was contended, however, on the part of the plaintiff, that at all events he was entitled to a return of the premium in respect of the goods, the insurance being from the landing thereof at Gottenburgh; as it appeared that there were no goods laden at Gottenburgh but only at London; the risk, therefore, as to the goods insured, never attached. Lord Ellenborough, C. J. directed the jury to find a verdict for the defendant; reserving liberty to move to enter a verdict for the plaintiff on both the points; which the Attorney-general accordingly did in the last term; when the Court, after much discussion, refused a rule nisi upon the first point, and granted it on the latter point only, upon which the case of Spitta v. Woodman (a) was mentioned.

With respect to the first point, the Attorney-general argued that though the sentence of condemnation

was conclusive as to the fact of the ship's having carried simulated papers, it did not show that it was unlawful for the Swedish owner to do so, as between him and the British underwriters. The latter knew at the time of subscribing the policy from Gottenburgh to Riga, that there was war between Sweden and Russia; and yet they insured the risk generally, without any stipulation; relying on the assured's using all the ordinary precautions to avoid danger, and lessen the risk, of which this of carrying simulated papers is one of the most notorious. And if the Swede, being his own insurer, would thus have endeavored to deceive his enemy, in order to protect his property; the British underwriters would have had occasion to complain if he had omitted the same precaution when the risk was cast upon them; there being no term in the policy against it.

LORD ELLENBOROUGH, C. J., then said: I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime; and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How, then, can the underwriter be answerable for a loss which happened from an act of the assured, done without his leave?

The other judges concurred with his lordship in this opinion. (1)

GARROW and CAMPBELL now showed cause on the other point. After a party has by his own act caused the loss of the goods, he cannot be permitted to demand a return of premium. But if that be no objection, here the policy being on the ship and goods, the premium in respect of the latter cannot be apportioned; and if it could, inasmuch as the ship with the goods on board was at Gottenburgh, that is a sufficient inception of the risk, and therefore the plaintiff is not entitled to any return. The case of Hodgson v. Richardson (b) will not govern the present; for although that was an insurance at and from Genoa to Dublin, and it appeared that the cargo had been put on board at Leghorn, and not at Genoa; yet the underwriter was not held to be discharged on that ground, but on the ground of concealment of material circumstances respecting the probable condition of the cargo. Neither does the case of Robertson v. French (c) decide this question; the Court having there only determined that a cargo laden at the Cape of Good Hope, before the ship's arrival "on the coast of Brazil," was not a cargo loaded on board "on the coast of Brazil" within the words and meaning of the policy on the return voyage. Spitta v. Woodman (a) in C. B., is certainly a decision against the defendant; but it has not been considered as conclusive; for the point has been again reserved in Langhorne v. Hardy, at the last sitting before the Chief Justice of that court.

THE ATTORNEY GENERAL, contra. The policy never attached on the goods, and therefore the

plaintiff is entitled to a return of premium. Spitta v. Woodman has expressly decided the point. It was, like the present, an insurance on goods at and from Gottenburgh, beginning the adventure from the loading thereof on board, without saying where: and it also appeared that when the policy was effected, the underwriter knew that the goods were laden at London and not at Gottenburgh: so that it was a much stronger case than the present to charge the underwriter with the risk, if by law it could have been done. But the Court, notwithstanding, thought they could only look to the written contract between the parties.

LORD ELLENBOROUGH, C. J. When this question was first agitated, I had a difficulty in putting the construction which is now contended for, on words which I really believe bore a different construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of Robertson v. French: and this question now comes before us after the case of Spitta v. Woodman. It is, therefore, no longer to be doubted what construction is to be put upon these words. It is to be considered also, in aid of such construction, that the goods may have been damaged in their transit from London to Gottenburgh, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk. It seems to me, therefore, that, under the terms of this policy, the risk upon the goods never commenced, and there must be therefore a proportional return of the premium.

GROSE, J., concurred.

LE BLANC, J. A different construction would at all events make the risk commence on the arrival of the ship at Gottenburgh, instead of from the loading of the goods there, which is the time specified in the policy.

BAYLEY, J. In De Symonds v. Sheddon (b) the Court of Common Pleas seem to have entertained the same opinion.

Rule absolute (1).

[Opinion in Oswell and Another vs. Vigne.]

Oswell and Another v. Vigne.

King's Bench, January 31, 1812.

This was an action on a policy of assurance on the ship "Wassila," at and from London to any port or ports in the Baltic. The policy did not contain any leave to carry simulated papers. The interest was averred in one of Yakof Fomin, and a total loss alleged by attack and seizure of the enemy. At the trial, before Lord Ellenborough, C. J., at the London sittings after the Trinity term, it appeared that Fomin was a Russian subject; that the ship sailed with a license on the voyage insured from London to Petersburgh; and after touching at Gottenburgh, was captured by a Danish privateer, carried in Arlborg, and condemned as prize to the captors; which sentence of condemnation was afterwards, on appeal, confirmed by the court of admiralty at Copenhagen. Extracts of the sentences of condemnation and confirmation were put in, and were as follows: 21st June, 1810: Sentence of condemnation pronounced in the case No. 7, the privateer Jorgen Neilson, plain-

tiff, and Capt. George Weyer, ship "Wassila," defendant. Under the present case it has been confessed by the captain and crew of the brig "Wassila," brought to Arlborg by the privateer Jorgen Neilson, that the ship coming from London has made use of an English convoy thence to Gottenburgh, and formerly from Cronstadt through the Belt. By reason thereof, and as the ship's papers are besides not in due order, there cannot, without any further examination, be the lease doubt but that the ship, together with that part of the cargo she had in at the capture, must be adjudged to the privateer who has made the prize at a lawful place, and has been supplied with a letter of marque. Sentence of confirmation, 2d December, 1810. Though the nationality of the ship "Wassila," as Russian, were perfectly cleared up, still it has been evidently proved, that it has been forfeited by the conduct of the plaintiff (the agent of Fomin at Copenhagen) and the captain on this voyage. It has been confessed by Capt. George Weyer, and his whole crew, and the plaintiff himself has acknowledged, that the vessel went last year through the Belt under English convoy with a cargo bound to London, which was also unloaded there. Afterwards the vessel went from London to Gottenburgh under convoy, and was to follow the same for the future; but she did not get ready soon enough. That the captain on the voyage has used a simulated clearance, has had false papers, and has kept a false journal. These are the usual means whereby to conceal a smuggling trade with the enemy. Thus it is plain

that this vessel is, according to the regulation for captors, liable to condemnation. And it concluded by decreeing that the sentence of the prize court should remain in force.

Under these circumstances it was contended at the trial, on behalf of the defendant, that the carrying simulated papers not being within the terms of the policy, and being the ground of the condemnation of the ship, the plaintiffs were not entitled to recover for a loss of which they were the efficient cause. But a verdict was taken for the plaintiffs, with liberty to the defendant to move to enter a nonsuit; which rule was accordingly obtained in the last term, when a case of Steele v. Lacy was cited, where the plaintiff having obtained a verdict at the sittings in London in C. B. under similar circumstances, the Court of C. B. afterwards granted a new trial.

The Attorney-General, Park, and Gaselee, now showed cause. 1st. Admitting that the sentence has proceeded on the ground of the ship having carried simulated papers, there is nothing illegal in carrying such papers; and though it may not be included within the precise term, it is nevertheless within the general scope of the adventure insured. This was an insurance from London to any ports in the Baltic; and the ship's destination was to Petersburgh; which is within the policy: It was well known to all parties that the circumstances of her having touched in England was a cause of condemnation in the enemy's ports. But as every ship must carry some clearance, and the want of one would in itself have been a ground of condemnation; so a true clearance in the present

case would have equally subjected her to condemnation, because it would have shown she came from England. By carrying simulated papers, therefore, the assured have done everything in their power to protect the underwriters, from the chance of a loss; who, if they had not so done, might more reasonably have objected that the assured had risked the safety of the ship by neglecting that which is now a common precaution. It would be unjust to hold that the carrying of simulated papers for the purpose of concealing a fact, which if known, must necessarily have induced a condemnation, avoids the policy. The only object in carrying them was the protection of the ship. (Lord Ellenborough, C. J. Is it contended that the assured are authorized to do any act intended for the bona fide protection of the ship? Would, then, the assured have been at liberty to resist a right of search on account of her having these papers on board?) Supposing that search would necessarily have led to her condemnation, the underwriters could not have objected to the assured's making such resistance. (Lord Ellenborough, C. J. Is not, then, the risk thereby altered; and should not the assured have authorized themselves, by leave of the underwriter, to take such precarious muniments on board?) They were not precarious, because without them the ship could not avoid condemnation. This is like the case of a ship carrying false colours to deceive an enemy in sight; if a condemnation ensued on that account, would it preclude the assured from recovering? (Bayley, J. Carrying false colours could not be a ground of condemnation. Lord Ellenborough, C. J.

Carrying a variety of colours has never been considered as a contravention of the law of nations.) False colours are more calculated to deceive than false papers; for they tend to elude pursuit and search. This is not like the case of Steele v. Lacy, (a) which left untouched the question as to simulated papers. There the ship had been condemned for not producing a passport when demanded. Denison v. Modigliani (b) has been overruled by Moss v. Byrom (c); in which later case it was held that the taking letters of marque without leave of the underwriter did not vary the risk, so as to avoid the policy. But, 2ndly. They argued that it did not necessarily appear on the face of these sentences that the ship was condemned for carrying simulated papers; that other causes were mentioned; as the confession of the captain that the vessel went last year through the Belt under English convoy with a cargo bound to London, which was also unloaded there; and that afterwards the vessel went from London to Gottenburgh under convoy. The sentence, therefore, first states a smuggling trade with the enemy, and then adds that the ship had simulated papers; and concludes, that those were the means whereby to conceal a smuggling trade with the enemy. It should seem, therefore, that the ground of condemnation was, that the ship carried on a smuggling trade with the enemy; and the other parts of the sentence are only the evidence whereby the Court arrived at that conclusion. The words in the first sentence, "by reason thereof" cannot refer to simulated papers; there being no mention made of

them in the preceding part: They must be taken to refer only to that which is stated before, viz., that the ship coming from London had made use of an English convoy, etc. Lord Ellensborough, C. J. The words are, "by reason thereof, and as the ship's papers are not in due order": it is a condemnation, therefore, for these conjunct causes.) It is incumbent on the underwriter to show affirmatively that the carrying simulated papers was a cause of condemnation: the assured is not bound to negative the possibility of its being so; and it is sufficient for him if it only remain doubtful.

GARROW, TOPPING and RICHARDSON, contra. Coupling the two sentences together, there can be no doubt that the carrying simulated papers was the ground of condemnation: or if, the sentences did not proceed wholly on this ground, that it was at least one of the operative causes; and in either view if the plaintiffs were not at liberty to carry simulated papers, they will be precluded from recovering in this action; because a party cannot avail himself of a loss of which he has been, in whole or in part, the efficient cause. The only remaining question therefore, is, whether the assured were at liberty to carry simulated papers without the permission of the underwriter? But that has been already decided in the negative in Horneyer v. Lushington (a) where the verdict having been found against the assured on this very point, the court refused to grant a rule nisi for a new trial. There is no inconvenience in that doctrine; for it is easy to give notice to the underwriter where the party means to carry simulated

papers, and to obtain his leave for that purpose; and it is right that such notice should be given, because in some respects the risk may be varied by carrying them. In Moss v. Byron the letters of marque were taken without any intention of using them.

LORD ELLENBOROUGH, C. J. It has been determined by the decisions of the courts of admiralty, that the carrying simulated papers is an efficient cause of condemnation. This ship had simulated papers on board. The question, then, is, if the carrying them were one of the causes of her condemnation: if it were, it was a risk to which the underwriter has been exposed without his consent. In Denison v. Modigliani, the taking the letters of marque only indicated an intention to use them, which if the assured had afterwards done that might have been a deviation, and discharged the underwriter; inasmuch as the party was not warranted to enter into a hostile speculation under an insurance intended to protect a mercantile adventure. But that intention was not carried into effect; and, therefore, the principles on which that case was decided, were in the subsequent case the Moss v. Byron, considered as new, and going to the extreme verge, and it has not since been acted upon. The question, however, here is, whether the stimulated papers were not a coefficient cause of condemnation? In order to ascertain that we must look to the sentence. It commences, "Though the nationality of the ship Wassila as Russian were perfectly cleared up, still it has been evidently proved that it has been forfeited by the conduct of the captain on this voyage. It has been

confessed by the captain and his whole crew, that the vessel went last year through the Belt under English convoy with a cargo bound to London, which was also unloaded there: afterwards the vessel went from London to Gottenburgh under convoy, and was to follow the same for the future, but did not get ready soon enough." It then seems to take up a new stage of proceeding applicable to this voyage. "The captain on this voyage has used a simulated clearance, has had false papers, and kept a false journal. These are the usual means whereby to conceal a smuggling trade with the enemy. Thus, it is plain, that this vessel is, according to the regulations for captors, liable to condemnation." Why does the sentence use the term "thus," except as referring to what has been before stated, viz., the having a simulated clearance and false papers? Can anyone doubt, after reading the sentence, that this is at least one of the efficient causes of condemnation? I cannot say that it did not make a main ingredient in the cause of condemnation; and if so, it has induced a forfeiture brought on by the act of the assured themselves. As long as the comity of nations is allowed to stand, and to regard these condemnations as final, and not as res inter alios acta, (1) it seems to me that looking at this sentence as our guide, we must consider the carrying simulated papers, as one of the grounds of forfeiture.

GROSE, J. Though this is an ungracious defence, yet, looking to the sentence, I cannot but say that the carrying simulated papers is a ground of the condemnation, and being so, that the plaintiffs

cannot recover upon this policy in consequence of the loss from that cause.

Le BLANC, J. The defendants contend that they are to be relieved from this loss, because it was induced by the act of the plaintiffs; and they are bound to make out that point. I take it to have been decided in many cases in the court of admiralty, that having simulated papers is a ground of condemnation. The question then, is, was this a ground, or one of the grounds, of condemnation? I think that looking at the sentence, it must be taken to be one of those grounds, independently of which we cannot say that the ship would have been condemned.

PAYLEY, J., concurred.

Rule absolute. (2).

Mr. DENMAN.—I also offer in evidence on the defense to the effect that there has not been a sailing on the voyage, and if there has been, that there was an abandonment of the voyage in the case reported in Law Reports, Queen's Bench Division, in 1893, Vol. 1, commencing at page 303, and entitled "Simon Israel & Co. vs. Sedgwick, in the Court of Appeal of England," and going on in the said book and ending on page 310.

[Testimony of Albert F. Pillsbury, for Defendant.]

ALBERT F. PILLSBURY, called for the defendant, being duly sworn, testified as follows:

I am Surveyor for the Board of Marine Underwriters in San Francisco, and prior to that time was the Master in the Pacific Mail Steamship Company and made frequent voyages to the Orient, between here and Japan and Manila. I have not been in the

port of Moji, Japan to stop there; I have passed the port in going through the Strait of Simina Saki. It is in the Strait of Simina Saki, which is the western port of the Inland Sea of Japan. La Perrouse Straits part the North Island of Japan from Saghalien, and is in a northerly direction from Moji. The Straits of Tsugaru separate the two larger islands of Japan, and are in a northerly direction from Moji. The port of Vladivostock is westerly and a little northerly from Tsugaru Straits. There is a coaling port called Mororan, in common use on Japanese voyages, at the eastern entrance of Tsugaru Straits.

[Recitals Relative to Motions for Certain Amendments.

Mr. Denman thereupon moved that the Answer to the Third Amended Complaint be amended to correspond with the proofs adduced by the testimony of the British Counsel, by the insertion of the words, "carrying contraband cargo," after the words, "It was the law of Great Britain that where a policy of insurance insures a vessel," on page 10 of the Answer, in the 4th line of the second paragraph. Also by inserting in line 23 on that page, the words, "or of the policy set forth in the complaint" after the words Exhibit "A," and made a part hereof; which motions were granted by the Court.

Mr. Denman then moved, on the same ground, to amend the Answer to the Third Amended Complaint by the insertion, after the words "papers" on line 29 on page 10 of said answer, "and used them to con-

(Testimony of John Livingston.)

ceal the destination of her cargo or its contraband nature."

The COURT.—I will not allow that, because it is a deduction that may or may not be drawn from the evidence. I refuse permission to make that insertion.

Mr. DENMAN.—I will note an exception.

[Testimony of John Livingston, for Defendant.]

JOHN LIVINGSTON was called for the defendant, and being sworn, testified:

I have been engaged in the marine insurance business about twenty years, as a member of the firm of Livingstone Smith & Company, as agents of the Maritime Insurance Company during that period. We were agents in California for that company in the month of December, 1904, and January, 1905, and for a year prior to that time. I did not at any time know that false papers were to be used on the "M. S. Dollar" on a voyage from San Francisco to Vladivostock, or to any other Oriental port in the month of December, 1904, or the month of January, 1905, and no such information was ever brought to our office. I knew nothing about the use of such papers or the intended use of them. It took, in the month of December, 1904, from twelve to fourteen days for a letter to go from Liverpool to San Francisco, according to the Atlantic voyage. I never knew of a letter, up to that time, coming in a shorter time than twelve days. A slower class of vessels was running then as compared with to-day across the Atlantic. The mail route from England here is from Liverpool

to Queenstown, from Queenstown to New York, and then by rail across, something about six or seven thousand miles I should guess. I knew generally what was being done in war risk lines on this coast at that time. We were writing war risks freely, but only to Japanese ports. Some to China, and some down to Manila. These were written on behalf of the same company and during the same period. It is our duty in regard to any information we receive regarding risks on vessels sailing in this neighborhood, written in London, to communicate it to the head office.

[Certain Offers in Evidence.]

[Excerpts from Arnould on Marine Insurance, etc.].

Mr. Frank then introduced in evidence on behalf of the plaintiff, section 30 of Volume I of Arnould on Marine Insurance, 7th Edition, page 39:

"Of the implied conditions and terms contained in every policy."

"30. Besides the different express clauses and stipulations, both ordinary and extraordinary, already considered, every policy of insurance implicitly contains within itself certain terms and conditions, which, though not on the face of the instrument, are of the same binding authority as though they were, and combine with the express clauses to make up the whole of the contract between the assured and the underwriters.

"They are, in fact, the terms upon which the parties mutually understand their contract to be based; and are regarded as so much a matter of course, that it would be a needless ceremony to express them in form. If either of the parties fail to comply with

any one of these conditions, he will in most cases be entirely precluded from taking any advantage of his contract.

"1. Thus, it is an implied condition in every policy that the assured, at the time of procuring the policy, shall fairly and truly disclose to the underwriters every fact material to the risk which is exclusively within his own knowledge, and which is not embraced by some agreement in the policy; if this condition is not complied with, the policy may be avoided by the underwriter.

"2. Again, in voyage policies the assured is understood by the very act of procuring the insurance to warrant that the vessel is seaworthy and in every way fit for the voyage or service on which it is employed; accordingly this warranty, though it is never expressed, is uniformly implied as a part of the contract.

"3. The actual navigation of the ship between the termini of the voyage is, as we have seen, never inserted in any policy; because every underwriter is presumed to be acquainted with the usual mode of conducting the voyage on which he has assured the risk; but, although never inserted, the usual course of the voyage is supposed to be incorporated in every policy, and as much forms part of its legal effect as though it were set out in terms on the face of the instrument.

"4. It is always an implied condition of every policy, that the ship, in proceeding from one terminus to the other, shall pursue this usual course of the voyage, without any delay or deviation; this implied condition is generally termed a condition not

to deviate; and any failure to comply with it exempts the underwriter from all liability from the moment of deviation.

"5. Not only the course of the voyage insured, but all generally established usages of trade and navigation, applicable to the subject of their contract, are always supposed to be known by the parties contracting for a mercantile indemnity; and therefore, though never expressly inserted in any policy, are as binding on the parties as though they were.

"6. It must never be forgotten, therefore, that the whole contract between the assured and the underwriters is only partially expressed in the policy; and that the real contract between them is, that, supposing the underwriters to have been informed beforehand of the real nature of the risk, supposing also (except in time policies) the ship to have been seaworthy when the risk commenced, and never afterwards to have deviated from the usual course of the voyage insured, and the assured not to have precluded himself from recovery on the ground of illegality of the risk, then the underwriters engage to indemnify him, according to the terms of the policy as explained by usage, for any loss he may sustain as a direct consequence of the enumerated perils."

Mr. Frank then offered section 57 of the said work in evidence:

"The following are some of the more prominent rules of construction that appear to have been acted upon by our courts in the interpretation of sea-policies.

"I. Every usage of a particular branch of maritime trade which is so well settled, or so generally known, that all persons engaged in that trade may fairly be taken as contracting with reference to it, is considered to form part of every sea-policy, designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference. Nor need any evidence be given in such cases that the usage has been communicated to the underwriter; for, as Lord Mansfield says, 'every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself.' The description of the voyage in the policy, he says, in another case, 'is an express reference to the usual manner of making it, as much as if every circumstance were mentioned' on the face of the instrument. 'What is usually done by such a ship, on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed.'

"Evidence of usage in these and the like cases does not vary the terms of the policy; but, as it is expressed by Lord Lyndhurst, merely 'introduces matters upon which the policy is silent.'

"It appears that an established usage, which is not expressly excluded by the terms of the written contract, cannot be excluded by parol agreement; a fortiori it seems to follow that a representation by an assured of an intention to vary from a usage, whether such representation amount to an agreement or not, cannot be binding on the underwriter if not made part of the written contract."

Mr. Denman then introduced in evidence the following from Arnould on Marine Insurance, 1st Volume, 7th Edition, Section 732, also Sections 726-731.

"Owing to the unexampled difficulties thrown in the way of English commerce during the great French wars, it became necessary to carry on trade with the Continent by the aid of simulated papers; yet our courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them.

"Thus, where a British ship sailed from London for the Baltic and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held that, as the policy contained no liberty to carry such papers, the assured could not recover, although it was notorious that the trade sought to be protected by the policy could not be carried on without such papers, so that the fact of having them on board actually tended to diminish the risk (k); and the decision of the Court was the same where the fact of carrying such simulated papers appeared by the sentence to be at least one of the efficient causes of condemnation."

"Of course, if the underwriters have agreed to the insertion on the face of the policy of a license to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground. (l)"

"Thus, where an American ship having sailed from London on a Baltic risk under a policy which contained an express license 'to carry simulated papers,' was subsequently condemned by the sentence of a Danish Prize Court, which although it recited many other motives of condemnation, yet proceeded mainly upon the ground of the ship's having carried simulated papers, Lord Ellenborough and the Court of King's Bench held that the underwriters were not discharged from their liability." (m)

"(k) Horneyer vs. Lushington (1812), 15 East. 46; (1811), 3 Camp. 85; see also S. P. Fomin vs. Oswell (1813), 3 Camp. 357; 1 M. & S. 393. These cases resolve in the affirmative a point left open by the Court of Common Pleas in Steel vs. Lacy (1810), 3 Taunt. 285—viz., whether it is necessary to have permission in the policy to carry simulated papers, in cases where it is notorious that the trade cannot be carried on without them."

"(l) Oswell v. Vigne (1812), 15 East, 70."

"(m) Bell vs. Bromfield (1812), 15 East, 364."

"726. With regard to the means of proving that the ship was seaworthy, or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel; after their evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to she was in their opinion seaworthy or not.

"Where a ship has been ordered to be sold abroad, as unseaworthy, by the sentence of a Vice-Admiralty

Court, such sentence is no evidence of the facts or grounds on which the condemnation proceeded.

"The whole question as to what constitutes seaworthiness, is peculiarly a question for a jury; and hence, where a special jury of merchants had twice given their verdict one way on a question of seaworthiness, the Court, although they considered the verdict not altogether satisfactory, refused to grant a rule for a third trial; nor would they allow the consolidation rule to be opened, in order to try the same question in another action against another underwriter on the same policy."

"727. If a ship be not provided with those documents which are required by the general law of nations, or by international treaties, to prove her national character, she is exposed, especially in seasons of general maritime war, to the danger of being condemned for the want of them."

"It is therefore an implied condition in every policy effected by the shipowner, that the ship in the course of the voyage and at the time of seizure shall have on board all such documents, whether her national character be or be not the subject of warranty or representation in the policy; it is not, however, requisite that she should sail with such documents, unless she be represented or warranted as of a particular national character."

"728. The consequences, however, of a failure to comply with this implied condition are very different from those that follow upon a breach of the implied warranty of seaworthiness.

"The warranty of seaworthiness, in the words of Lawrence, J., 'is implied from the very nature of a contract of insurance; the consideration of an insurance is paid in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriters gaining the premium; but if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium, and if the consideration fails the obligation fails. But that is not the case with a ship not having proper documents on board; she may, nevertheless perform the voyage; at least, there is no certainty that she will not, as there is in the case above alluded to.' "

"Accordingly, it is established that a want of proper documents on board discharges the underwriter from his liability only when the sentence of the foreign Prize Court shows that the condemnation proceeded either expressly upon that as the sole ground, or as one of the grounds; and it has further been held by Lord Ellenborough, and not contradicted by any subsequent authority, that even in this case the underwriter will not be discharged unless his contract was with the owner of the ship, from whom he had a right to expect, and who had the power to provide, that she should have on board all documents required for her protection.

"729. First, in order to discharge the underwriter on the ground of failure to provide proper documents of nationality, it must distinctly appear,

from the whole of the foreign sentence taken together, that the want of such documents was the ground, or a ground, of condemnation.

"At one time, as we have already seen, our courts, in interpreting the sentences of foreign tribunals of prize, would only look to the adjudicative part of the sentence for the ground on which the foreign Court proceeded.

"A more reasonable canon of construction was adopted afterwards; and the rule now is that, if upon examination of the whole sentence taken together it appears that want of proper documents, as required by treaties, was one of the alleged grounds on which the sentence of condemnation proceeded, our Courts will consider the sentence proof that the assured has failed to comply with the implied condition, and hold the underwriter discharged from his liability.

"Consequently, where an American ship (not warranted American) was condemned in a French Court of Prize on the express ground, alleged in the premises of the sentence, that she was not properly documented according to the existing convention between the French Republic and the United States, Lord Ellenborough held that the underwriters on ship were discharged from their liability, although the sentence also proceeded on the ground of a suppression of papers by the master after her capture.

"So where an American ship, which had sailed from New York to London with naval stores, was chartered from London for a voyage to the Baltic

during the height of Napoleon's Continental system, and ultimately condemned in a Danish Prize Court for want, amongst other grounds of condemnation, of a sea passport and muster rolls, the Court held the Underwriters discharged from their liability, although if the ship had produced her sea passport it would have subjected her to French condemnation under the Berlin decree, as showing that she had last come from London.

"730. Secondly, the implied condition that the ship shall be properly documented does not extend to any document except those required by the general law of nations or by subsisting international treaties; for the purpose of this defense, therefore, it must clearly be made out that the documents, for want of which the ship was condemned, fell within one or other of these two categories.

"Hence, where an American ship was condemned on the express ground that she had not the documents required by certain recent French Ordinances, which were contrary to the terms of the treaty then subsisting between France and the United States, and not adopted by any public international act of the two governments, it was held that the underwriters were not discharged from their liability.

"Again, where an American ship was condemned in a Danish Prize Court because her sea passport was not verified with the Notary's name and seal of office the Court called upon the counsel for the underwriters to show by what rule of the law of nations, or by what clause in any subsisting treaties between

Denmark and the United States, it was required that the sea passport of an American ship should be so verified.

"A register is not a document required by the law of nations as evidence of a ship's national character; hence, where a ship described in the charter-party as a Pappenburgher, was condemned in a Danish Prize Court 'for want of a Pappenburgh register,' the Court held that the underwriter, in order to discharge himself from liability, must show that a register was required as a proof of national character by some subsisting treaty between Denmark and the country to which the ship belonged. 'We want evidence' says Mansfield, C. J., in giving judgment against the underwriters, 'to show on what reasons the want of this register was made a ground of condemnation.'

"731. Thirdly, it has been laid down by Lord Ellenborough after full consideration, that a want of proper documents shall only discharge the underwriter when the insurance is affected for the shipowner, and not for the owner of the goods.

"Thus, where, from an omission of the captain, goods insured for a voyage from this country to a foreign port were not mentioned in the ship's manifest as required by Act of Parliament, but it did not appear that the loss was in any degree owing to this defect, Lord Ellenborough held the underwriters liable on the ground that there was no implied warranty, on the part of the owner of the goods, that the ship would be properly documented.

"Thus, where the policy was on 'goods' on board a ship which was in fact, but not represented to be, an American and the ship being captured by the Spaniards was condemned on the express ground of her not being properly documented according to the treaties then subsisting between Spain and the United States, Lord Ellenborough held that the underwriters were not discharged on this account; and on this case being mentioned in that of Bell v. Carstairs, his Lordship supported it on the ground that it was the case of an insurance on goods, 'where the owner of the goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for the voyage': whereas, in a policy on ship 'the shipowner is bound to have such documents as are required by treaties with particular nations to evince his neutrality in respect to such nations.

"Marshall and Phillips seem to consider this distinction a very questionable one, upon the ground that the assured on goods might as well contend that the unseaworthiness of the ship was no answer to his claim upon the underwriters. But, as, according to the authorities already cited, there seem good grounds for holding that the implied condition that the ship shall be properly documented stands on a wholly different footing from the implied warranty of seaworthiness, these objections, which proceed upon the assumption of a complete analogy between the two cases, are not entitled to much weight. The distinction taken by Lord Ellenborough (and since adopted

by the Court of Common Pleas) seems to rest on a very satisfactory foundation, nor does there appear any reason why the implied condition as to proofs of national character ought to be more widely extended.

"733. Another warranty or condition implied by the law in the policy is that the adventure insured shall be in its own nature, and in the manner and means by which it is pursued, in accordance with law. But the importance of the subject, the modifications that affect it, and the various classes of illegal acts that require consideration, make it desirable to treat of the whole subject of illegality in a separate chapter."

[Excerpts from Duer on Insurance.]

Mr. Frank offered in evidence the following from II Duer on Insurance, page 627, beginning with section 47:

"Section 47. The use of false papers to disguise the true character, ownership or destination of the property insured, or any other circumstances, by which it may be rendered liable to capture or seizure, stands substantially, on the same grounds as the want of necessary documents. Where no permission to use such papers is given by the insurer, or his consent to assume the risk, from the known usage of the trade or other circumstances, cannot be implied, he is not responsible for the loss that the simulated papers may have occasioned, or to which they may have contributed. The risk, in such cases, is excepted, even where it is not included by a warrant or representation, and the loss, as in the former case, is

considered as resulting from a wrongful act of the assured, for which, under the general terms of the policy, the insurer is never liable. Nor is the exemption of the underwriter to be limited to the cases, in which false papers are used to conceal the character or ownership of the property insured. The goods insured may be innocent and lawful, and their character as such may be apparent on the bill of lading, and other papers; and yet they are justly liable to confiscation, where the assured, or his agent, seeks to cover, by simulated papers the unlawful goods of other persons shipped by the same vessel. If the policy, in such a case, embraces a warranty of neutrality, and the goods covered, are belligerent property, the act of the assured as a breach of the warranty, vitiates the contract; and where there is no such warranty, as it creates a risk, not contemplated by the insurer, he is exonerated from the loss.

"Section 48. The language of the Court of King's Bench, in some of the reported cases, seems to imply, that the leave to carry simulated papers, must be given, by an express provision in the policy, and that a mere disclosure to the insurer, of the intention to use them, would not be sufficient to charge him with the risk. It is, however, certain, from other cases in the English courts and from numerous decisions in the United States, that where the carrying of false papers, in the voyage or trade to which the insurance relates, is a known or general usage, or where the use of such papers, from the very nature of the voyage, is indispensable, the law will impute to the in-

surer the knowledge of the fact and imply his consent to assume the risk; and it appears to be a necessary inference from these decisions, that the insurer must be equally liable, where his knowledge of the facts is proved by evidence of a direct representation prior to the insurance. Where he subscribes the policy, with a knowledge of the facts, his consent to assume the risk, may be as justly implied, in the one case, as in the other."

"In Planche v. Fletcher (Doug. 283), the true destination of the ship was concealed by a false clearance, and it was insisted, that the omission to disclose this fact, was a fraud upon the underwriters; but Lord Mansfield said, 'there was no fraud on them or on anybody, since what had been practiced had been proved to be the constant course of the trade, and notoriously so to everybody.' From this usage, therefore, the underwriter's knowledge of the fact, and his consent to assume the risk were inferred. In Livingstone v. Maryland Ins. Co. (7 Cranch. 506), where false papers were used to disguise the true ownership of the property, it was urged, as a fatal objection to the plaintiff's recovery, that the intention to use those papers, was not communicated to the underwriter, but the reply was, that the papers were rendered necessary by the nature of the trade insured, and by its known course and usage.' And Ch. J. Marshall, in delivering the opinion of the Court, laid down the general rule in these words: 'Where the underwriters know, or by the usage and course of trade, ought to know, that certain papers ought

to be on board for the purpose of protection, in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used, as to protect the property.' The property, in this case, was, in reality, American but the false papers gave it a Spanish character, for the purpose of protecting it in the ports of a Spanish colony, to which she was destined, and where a trade by Americans was prohibited. As Spain and England, however, were at war, the false papers exposed the property to English capture, and it was from this cause that the loss arose. The opinion of the court was, that if the jury believed, from the evidence, that the use of the papers was necessary, or justified by the usage of the trade, there was no concealment that could affect the right of the plaintiff to recover. Galbreath v. Gracy (1 Wash. C. C. R. 192). Maryland Ins. Co. v. Bathurst (5 Gill & Johns. 159). Le Roy v. United Ins. Co. (7 Johns. 343), recognize the same rule, that where the use of false papers is warranted by the use of the trade, it is not necessary to be disclosed to charge the underwriter with a risk; a fortiori leave to carry the papers, is not necessary to be given by the policy. So, where the policy, by specific or general words, covers the risk of belligerent property, the use of false papers, to give a neutral character to the property, is not necessary to be disclosed, on the ground 'that no underwriter can be ignorant of the practice of neutrals to cover belligerent property, and of the measures ordinarily resorted to in order that the cover may escape detec-

tion.' Buck & Hedrick v. Chesapeake Ins. Co. (1 Peters S. C. R. 151), opinion of Mr. J. Johnson. It may be added, in this case, the use of false papers can be no ground of complaint to the insurer, for instead of increasing, it diminishes the risk, that he agrees to assume, by lessening the chances of a capture and condemnation. The cover is as much for the benefit of the underwriter as of the assured. It seems, therefore, a very just observation of Benecke, on the decision of the King's Bench, in Oswell v. Vigne, that as it was known to the insurer when the policy was effected, that the vessel insured, would be liable to seizure in the continental port of destination, unless by false papers, the fact of her having sailed from England, could be concealed, his consent to the use of such papers, ought to have been implied. They were rendered necessary by the nature of the voyage and it was for the benefit of the insurer that they should be used. It may be regarded as certain, that in the United States, such would have been the decision. (3 Benecke, 331.)"

[Excerpt from Opinion in Pelly vs. Royal Exchange Assurance Co.]

Mr. Frank then offered in evidence the case of Pelly v. Royal Exchange Assurance Co., reported in the 1st of Burrows Reports, page 341:

"The plaintiff being part owner of the ship 'Onslow,' an East India ship, then lying in the Thames, and bound on a voyage to China and back again to London, insured it at and from London, to any ports and places beyond the Cape of Good Hope, and back to London, free from average under ten per cent

upon the body, tackle, apparel, ordinance, munition, artillery, boat and other furniture of and in the said ship; beginning the adventure upon the said ship, &c., from and immediately following the date of the policy; and so to continue and endure until the said ship, with all her ordinance, tackle, apparel &c., shall be arrived as above, and hath there moored at anchor twenty-four hours in good safety. And it shall be lawful for the said ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to this assurance. The perils mentioned in the policy are the common perils, viz.: of the seas, men-of-war, fire, enemies, pirates, &c., &c., and all other perils, losses and misfortunes, &c. The premium was seven guineas per cent, with the usual abatement of two per cent in case of a loss.

"The ship sailed, &c., arrived in the river Canton in China; where she was to stay, to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture were, by the captain's order, taken out of her and put into a warehouse or storehouse called a bank-saul, built for that purpose on a sand-bank or small island, lying in the said river, near one of the banks, called Bank-saul Island, about two hundred or two hundred and twenty yards in length, and forty or fifty yards in breadth; in order to be there repaired, kept dry, and preserved till the ship should be heeled, and cleaned and refitted. Some time after this, a fire accidentally broke out in the bank-saul belonging to a Swedish ship, and communicated itself to another bank-saul, and from

thence to the bank-saul belonging to the 'Onslow,' and consumed the same, with all the sails, yards, tackle, cables, rigging, apparel, and other furniture belonging to the 'Onslow' which were therein.

"It was stated that it was the universal and well-known usage, and has been so for a great number of years, for all European ships which go a China voyage, except Dutch ships (who for some years past are denied this privilege by the Chinese, and look upon such denial as a great loss), 'when they arrive near this Bank-saul Island in the river Canton, to unrig the ship and to take out her sails, yards, tackle, cables, rigging, apparel, and other furniture, and to put them on shore, in a bank-saul built for that purpose on the said island (in the manner that had been done on the present occasion by the Captain of the "Onslow"), in order to be there repaired, kept dry, and preserved until the ship should be heeled, cleaned, and refitted.' And the case further states that it appears that the so-doing is prudent, and for the common and general benefit of the owners of the ship, the insurers and insured, and all persons concerned in the safety of the ship.

"The ship arrived from her said voyage, in the Thames, in September, 1755 (having been unrigged, and put in the best condition the nature of the place and circumstances of affairs would permit).

"Question. Whether the insurers are liable to answer for this loss (so happening from this bank-saul), within the intent and meaning of the policy?"

LORD MANSFIELD delivered the opinion of the Court:

"By the express words of the policy, the defendants have insured the tackle, apparel, and other furniture of the ship 'Onslow,' from fire, during the whole time of her voyage, until her return in safety to London, without any restriction.

"Her tackle, apparel, and furniture were inevitably burnt in China, during the voyage, before her return to London.

"The event then which happened is a loss within the general words of the policy; and it is incumbent upon the defendant to show, from the manner in which this misfortune happened, or from other circumstances, 'that it ought to be construed a peril which they did not undertake to bear.'

"From the nature, object, and utility of this kind of contract consequences have been drawn, and a system of construction established upon the ancient an inaccurate form of words in which the instrument is conceived.

"The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

"Hence, among many other, the following rules have been settled:

"If the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable, because he is understood to engage that the thing shall be done, save from fortuitous dangers, provided due means are used by the trader to attain that end.

"But the master is not in fault, if what he did was done in the usual course, or necessarily ex justa causa.

"The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed and the usual course and manner of doing it. Everything done in the usual course must have been foreseen, and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual or necessary would be done.

"It is absurd to suppose, when the end is insured, that the usual means of atttaining it are meant to be excluded.

"Therefore, when goods are insured 'till landed' without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore.

"If it is usual to stay so long at a port, or to go out of the way, the insurer is considered as understanding that usage. Bond v. Gonzales, 2 Salk, 445, was so ruled by Ld. Ch. J. Holt.

"If goods are insured on board one ship, to a port, and from thence on board another ship, the first that can be got, the insurance extends through all the intermediate steps, of removing from one ship to the other, as usual. For the means must be taken to be insured, as well as the end.

"All this has been determined in the case of Tierney v. Etherington, at Guildhall, 5th March, 1743. That was an insurance on goods in a Dutch

ship from Malaga to Gibraltar, and at and from thence to England and Holland, both or either, on goods as hereunder agreed, beginning the adventure from the loading, and to continue till the ship and goods arrived at England or Holland and there safely landed.

"The agreement was, 'that upon the arrival of the ship at Gibraltar, the goods might be unloaded, and reshipped in one or more British ship or ships, for England and Holland, and to return one per cent if discharged in England.

"It appeared on evidence that when the ship came to Gibraltar, the goods were unloaded, and put into a store-ship (which it was proved was always considered as a warehouse); and that there was then no British ship there. Two days after the goods were put into this store-ship, they were lost in a storm.

"For the defendant, it was insisted, that the insurance was only upon the Dutch and British ships, and that it did not extend to the store-ship; which is considered as a warehouse at land, and so not a peril at sea.

"For the plaintiff, it was insisted, that this was a loss in the voyage; for the policy is, for all losses at Gibralter, as well as to and from. If there had been a British ship there, and the goods had been put into a lighter, in order to go to the British ship, and lost in the way, that would have been a loss within the policy.

"We have liberty to unload and reship; and therefore have a liberty to use all the means in order to do that.

"LEE, Ch. J., said: It is certain, that, in construction of policies, the strictum jus, or apex juris, is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured. But it seems to be a strict construction to confine this insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be according to the course of trade in this place. And this appears to be the usual method of unloading and reshipping in that place, viz.: 'that when there is no British ship there, then the goods are kept in store-ships.'

"He added, that where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy, if that be the usual place to which the ships come.

"Therefore, as here is a liberty given of unloading and reshipping, it must be taken to be an insuring the goods under such methods as are proper for the unloading and reshipping. Here is no neglect on the part of the merchant (the insured) for the goods were brought into port the 19th, and were lost the 22nd of November.

"This manner of unloading and reshipping is to be considered as the necesary means of attaining that which was intended by the policy, and seems to be the same as if it had happened in the act of reshipping from one ship to the other. And as this is the

known course of trade, it seems extraordinary if it was not intended.

"This is not to be considered as a suspension of the policy, during the unloading and reshipping from one ship to another. For, as the policy would extend to a loss happening in the unloading and reshipping from one ship to another, so any means to attain that end come within the meaning of the policy.

"And accordingly, a verdict was given for the plaintiff."

"In the Easter Term following, a new trial was moved for; but it was refused by Lord Ch. J. Lee, Mr. Just. Chapple, and Mr. Just. Denison; Mr. Just. Wright indeed being of a different opinion, namely, 'that it was a removal at the peril of the insured.'

"So, in the present case, the same reasoning will hold. And, in general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it was expressed.

"The usage, being foreseen, is more strongly allowed to be done than what is left to the master's discretion upon unforeseen events; yet if the master, ex justa causa, goes out of the way (as to refit, or to avoid enemies, pirates, &c.), the insurance continues.

"Upon these principles it is difficult to frame a question which can arise out of this case, stated.

"The only objection is, 'that they were burnt in a bank-saul and not in the ship; upon land, and not at sea, or upon water; but, being appertinent, the ship, losses and dangers ashore could not be included.'

"The answer is obvious. (1st) The words make no such distinction. (2ndly) The intent makes no such distinction.

"Many accidents might happen at land, even to the ship.

"Suppose a hurricane to drive it a mile on shore, or an earthquake may have a like effect; suppose the ship to be burnt in a dry-dock; or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom or other mischance.

"These are possible cases. But what might arise from an accidental occasion of refitting the ship is not near so strong as a certain necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation.

"Here, the defendants knew that the ship must be heeled, cleaned and refitted in the river of Canton. They knew that the tackle, &c., would then be put in the bank-saul; they knew it was for the safety of the ship, and prudent that they should be put there.

"Had it been an accidental necessity of refitting, the master might have excused taking them out of the ship ex justa causa. But describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned.

"Was the chance varied by the fault of the master? It is impossible to impute any fault in him.

"Is this like a deviation? No; 'tis ex justa causa, which always excuses.

"And yet Sir Richard Lloyd, being pressed in his argument, was obliged to insist that it resembled a deviation, which determines the insurance and discharges the insurer.

"Answer. This supposes the parties to insure from London and back again, knowing that the policy would be determined in the river of Canton, which would be absurd. Besides, it ought to make a difference in the premium, yet the underwriters have all kept the premium upon other China voyages.

"One objection was formed by comparing this case to that of changing the ship or bottom on board of which goods are insured, which the insured have no right to do.

"Answer. There the identical ship is essential; for that is the thing insured. But that case is not like the present.

"Another objection was, 'that policies ought to be construed strictly, and not to be extended to cases omitted' (which latter position is true, and must be agreed.)

"Answer. But that is not the present case; for this is not a casus omissus; but clearly within the view and bona fide intent of the policy.

"The case of Fitzgerald v. Pole is in no way applicable to the present. The question there was, 'whether it was a partial or a total loss, within the meaning of the policy.' In that case there was nothing fixed by usage, or by known and established construction (as there is in this case); so that no inference can be drawn from that case, concluding to this.

"Here the defendants knew that the tackle and furniture would be put in this bank-saul, as the usual, certain consequence of the voyage at sea, which always made it necessary to heel, clean, and refit the ship in the river at Canton. Had the insurers been asked, they must, for their own sakes, have insisted they should be put there, as the best and safest method. They would have had reason to complain, if, from their not being put there, a misfortune had happened; in that case the master would have been to blame, and, by his fault, would have varied the usual chance.

"They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one.

"Therefore we (all of us who heard the argument) are very clearly of opinion, that in every light and every view of this case, in reason and justice, and within the words, intent, and meaning of the policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss."

[Excerpt from Opinion in Buck & Hedrick vs. Chesapeake Ins. Co.]

Mr. Frank then offered in evidence that portion of the case of Buck & Hedrick v. Chesapeake Ins. Co., referred to by Mr. Duer, which interprets the case of Pelly vs. Royal Exchange Assurance Co., and found in 1 Peters, United States Supreme Court Reports 161:

"Whatever term of expression may be given to the question, or in whatever aspect it may be presented, it is obviously, at least, no more than the simple question, have these underwriters been entrapped, or imposed upon, or seduced into a contract, of the force, extent or incidents of which, a competent understanding cannot be imputed to them? A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract; must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in Pelly vs. Royal Exchange, etc., 1 Burr. 341, 'the insurer, at the time of underwriting has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy.' Hence, when a neutral carrying on a trade from a belligerent to a neutral country asks for insurance 'for whom it may concern,' it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property, under neutral names, or of the precautions ordinarily resorted to, that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary, than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters thus inter-

cepted, have often been the groundwork of condemnation in admiralty courts; and underwriters, to whom the extention of trade is always beneficial, must and do connive at the practice, in silence. They ask no questions, propose their premiums, and the contract is as well understood, as the most thorough explanation can make it."

[Excerpts from Vol. 1 of Duer on Insurance.]

Mr. Denman thereupon presented that portion of Volume I of Duer on Insurance reading as follows:

"The law and practice of marine insurance, deduced from a critical examination of the adjudged cases, the nature and analogies of the subject, and the general usage of commercial nations; by John Duer, L. L. D. Dedicated to the founder of the American School of Commercial and Maritime Law, whose name each reader will instantly supply. To him, who by the example of his life, as well as his labors and his writings, has raised the character and dignity of the legal profession in these United States, this work on marine insurance, the fruit, in a measure, of his personal approbation and encouragement, is now inscribed, by his friend and disciple, the author. Published in New York by John S. Voorhies, at the corner of Nassau and Cedar Streets, in 1845, and entered according to the Act of Congress, in the same year:

"Section 20. The subject of maritime capture, that is now concluded, has extended much beyond the limits that it was my first intention to observe; yet on reflection, I am persuaded, that it will not be found to occupy a relative space, disproportioned to

its actual utility. In time of war, a knowledge of the extraordinary and peculiar risks that the war creates, is of paramount importance to the merchant, and to the insurer, not only in every belligerent, but in every neutral country; and in the existing treaties on marine insurance, this necessary information will be sought in vain. We should err greatly in supposing, that its value consists merely in enabling us to judge of the validity of insurances made in a belligerent country. The multiplied risks to which a war exposes the property of neutrals, form the most extensive and difficult branch of the subject, and it is to the neutral merchant and the neutral insurer that the knowledge of these is most essential. To the merchant, that he may not involve his property in perils that he might otherwise avoid, or may frame his contract, so as to cover the risks that he may choose to encounter. To the insurer, that he may not assume risks, wholly disproportionate to the premium that he receives, or satisfy losses that the terms of his contract, properly understood, do not embrace. Hence, the inquiries we have concluded, as will hereafter be more distinctly seen, have an intimate connection with many subjects, that remain to be treated, particularly concealment, representation, and warranty; and the information that has now been given, will relieve us from the necessity of recurring, except by a general reference, to most of the topics that it embraces.

"It would be unjust to close this discussion, without a tribute of gratitude and praise to the illustrious judge, from whose decisions, the law that I

have attempted to methodize and explain, has been chiefly extracted. In the same sense in which Lord Mansfield is usually termed the father of commercial law in England, Sir William Scott may be justly regarded as the founder of the law of maritime capture. Its principles, it is true, had been stated by the great writers on public law—Grotius, Puffendorf, Vattel and Bynkershosk—but they were stated in terms so loose and general, as rendered them too liable to be differently understood and applied, by different nations. It is, by a series of judicial decisions, in the prize courts of England and of the United States, and principally by those of Sir William Scott, that these principles have been rendered clear, definite and stable; by their extended application, in practice, have been rescued from the domain of theory, and by successive elucidations and varied illustration, have been expanded and wrought into a consistent, harmonious and luminous system. The opinions of Sir William Scott, the chief architect of this noble structure, are those, not merely of a jurist, but of a scholar, philosopher and statesman; and they are as much distinguished, by the beauties of their composition, as by their sagacity, and learning, and comprehensive views. The style, although occasionally diffuse, is pure and vigorous, fertile in appropriate imagery, and rich in classical allusion. It is not, indeed, marked by that simple gravity, that we expect to find in the decisions of the courts of common law, but it is admirably suited to the discursive nature of the investigations in which he was engaged, and in which

the rules that he sought to establish, are not founded on rigid precedents and technical analogies, but are drawn from the sources of a higher wisdom—that which connected the duties of nations with their true and permanent interests, and the precepts of a universal and unchanging morality.

"Section 21. It remains only to add, that the decisions of the Supreme Court of the United States on all questions of international law, even where they differ from the opinions of jurists, or the adjudications of the English admiralty, must be followed and obeyed, not only by the inferior courts of the United States, but by all the courts of the respective states of the Union. So long as they remain unchanged by the tribunal that pronounced them, they are conclusive evidence of the law of nations, as understood and maintained by our own government. We have seen, however, that this necessity for disregarding foreign authority rarely occurs, since there is scarcely a decision in the courts of Westminster, on any general question of public law, that has not been expressly, or by a necessary implication, approved and sanctioned by our national courts. On questions that have not yet been decided in our own courts, the decisions of the English admiralty are certainly to be regarded as presumptive, although not conclusive evidence, of the existing law, that both countries equally recognize, and are bound to follow."

[Excerpts from Vol. 2 of Duer on Insurance.]

Mr. Denman thereupon introduced in evidence and read the following extract from page 639 of Duer on Insurance, Vol. II:

"It seems, therefore, a very just observation of Benecke, on the decision of the King's Bench, in Oswell vs. Vigne, that as it was known to the insured when the policy was effected that the vessel insured, would be liable to seizure in the continental port of destination, unless by false papers, the fact of her having sailed from England, could be concealed, his consent to the use of such papers, ought to have been implied. They were rendered necessary by the nature of the voyage and it was for the benefit of the insurer that they should be used. It may be regarded as certain, that in the United States, such would have been the decision."

[Excerpts from the English Ruling Cases.]

Mr. Denman then offered in evidence the English and American notes immediately succeeding the case of Pelly vs. Royal Exchange Assurance Company, reported in the English ruling cases arranged, annotated and edited by Robt. Campbell, M. A., on pages 42, 43, 44 and 45 in Ruling Cases, Volume XIV."

"ENGLISH NOTES.

"The case of Salvador v. Hopkins (1765), 3 Burr. 1707, arose out of an insurance for a voyage in the East India trade "at and from Bengal to any ports in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forward and backwards, and during her stay at such place until her arrival in London." By the original charter-party it appeared that the voyage originally contemplated should terminate in February 1764, but it was a known incident of such voyages that the East India

Company, who had control of the voyage, might detain her longer. After the arrival of the ship in Bengal the Company made a new agreement under which the ship would be detained in India for another year. Under this agreement she sailed back to Bombay and sailed again to Bengal, and on returning from Bengal the second time was lost. It was objected that the insurance was made after the advice of the new agreement was received, and that the insurers were not informed of it. It was held by the Court in a judgment delivered by Lord Mansfield that the usages of the trade for a ship detained beyond the time mentioned in the original charter-party was notorious, and that the insurers must be taken to have been cognizant of it, and that it was one of the incidents of the voyage that a ship might be detained in the country trade; and that it would cause great confusion and litigation if the assured in such cases should be bound to open to the insurer all the grounds of his expectations about the time of the ship's coming home.

"In Noble v. Kennoway (1780), 2 Dougl. 510, a somewhat similar decision was given on an insurance in a fishing voyage on the coast of Labrador. The insurers complained that there had been unreasonable delay in unloading the cargo, and that this gave the opportunity for the ship to be taken by an American privateer. To show that the delay was not unreasonable, evidence was given of the usage of the fishing trade on this coast, and also of the usage on the coast of Newfoundland,—the latter evidence be-

ing admitted, although objected to. It was held that the underwriters were bound by the usage.

"In Gregory v. Christie, (1784) 3 Dougl. 419, the insurance was 'on goods, specie, and effects' at and from London to Madras and China, with liberty to touch, stay, and trade at any ports, etc., until the vessel shall arrive at her last loading port in the East Indies or China. It was held that by the usage of the East India trade this policy covered an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China; and also that, by the usage of trade, the words 'goods, specie, and effects' cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest.

"So in Brough v. Whitmore (1791), 4 T. R. 206, 1 R. R. 361, where the stores and provisions for the crew had been taken out of the ship for the purpose of refitting, and were destroyed by accidental fire while stored in a warehouse in the Canton River, it was held that the insured was entitled to recover under a policy of insurance of ship and furniture.

"A strong case of usage importing an incident to the adventure is furnished by the case where a ship insured 'at and from Oporto to London' was blown out to sea and lost while waiting outside the bar to complete her loading. It was proved that this was usual for vessels at Oporto; and the insured were held entitled to recover. Kingston v. Knibbs, (1758) 1 Camp. 508 n., 10 R. R. 742 n.

"Where a policy was effected on living animals free from mortality and jettison, and in consequence

of the agitation of the ship in a storm some of the animals were killed and others received such injuries that they died before the termination of the voyage:— it was held that this was a loss by peril of the sea; and the exception of 'mortality' did not apply, since that word in its ordinary and popular sense was not applicable to the circumstances of the death. Lawrence v. Aberdein, (1821) 5 B. & Ald. 107, 24 R. R. 299.

"In the case of Gabay v. Lloyd, (1825) 3 B. & C. 793, 27 R. R. 486, this decision was followed in a similar policy; and an alleged usage at Lloyd's (where the policy was affected), that on such a policy no loss was paid if the ship arrived safe, was rejected, it not being shown that the usage was general, or that the plaintiff had knowledge of it.

"AMERICAN NOTES.

"This case is cited in 1 Parsons on Marine Insurance, pp. 80, 477, 563, and in Lawson on Usages and Customs, pp. 116, 414, and in 1 Duer on Insurance, pp. 161, 211, 234; and in Merchants' Ins. Co. v. Edward Davenport & Co., 17 Grattan (Virginia), 144; Hofman v. Aetna F. Ins. Co., 32 New York, 405; Alabama G. L. Ins. Co. v. Johnston, 80 Alabama, 467; 60 Am. Rep. 112.

"Sustaining the rule: Tesson v. Atlantic M. Ins. Co., 40 Missouri, 33; 93 Am. Dec. 293; Daniels v. Hudson R. F. Ins. Co., 12 Cushing (Mass), 416, 59 Am. Dec. 192; Glendale Woolen Co. v. Protection Ins. Co., 21 Connecticut, 19; 54 Am. Dec. 309; Whitney v. Ocean Ins. Co., 14 Louisiana, 485; 33 Am. Dec.

595 (custom not to employ pilot); Grant v. Lexington F. L. & M. Ins. Co., 5 Indiana, 23; 61 Am. Dec. 74 (discharging hands); Coit v. Commercial Ins. Co., 7 Johnson (N. Y.), 385; 5 Am. Dec. 282 (sarsaparilla not a 'root'); Astor v. Union Ins. Co., 7 Cowen (N. Y.), 202 (skins and hides not 'fur'); Allegre's Adm'rs. v. Maryland Ins. Co., 2 Gill & Johnson (Maryland), 136; 20 Am. Dec. 424 (whether 'cargo' covered live-stock).

"In Hall v. Ocean Ins. Co., 21 Pickering (Mass.), 472, it was left to the jury to decide, whether according to the custom of Boston, the loss of the small boat from the stern davits should be charged to the insurers; citing Blackett v. Royal Ex. Ass. Co., 2 Cr. & J. 244. In Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. 108, it was held that although usually insurers are not liable for loss of goods carried on deck, yet they are liable if the goods are such as are usually carried on deck, and if it is customary for insurers to pay for them when they are thus carried and lost or damaged. The Court said: 'The construction which has from time to time been given by Courts in judicial decisions, and the ordinances of commercial countries, and the known usages, touching this contract, have been introduced and considered as part of the law merchant of the civilized world; and we are not disposed to narrow the view.

"We agree to the cases cited by the counsel for the plaintiffs as to the usages of and course of trade, as to the place and mode of taking in and discharging the cargo, and the usages touching the manner of

conducting the voyages. Take, for example, the well-known case of the loss of the sails and rigging of a ship which were burnt on the Bank-Saul Island. Pelly v. Royal Exchange Ass. Co., 1 Burr. 348. The defense was, that the sails and rigging were on the land when they were burnt. The satisfactory answer was, they were properly placed there, according to the known usage, while the ship was cleaned, heeled, and refitted. Many other instances of usages may be found in the cases mentioned by Lord Mansfield in the case last cited, of which underwriters are bound to take notice. 'We agree to the position which is stated for the plaintiffs, a settled usage of trade to which the policy relates, not contrary to any principle of law, and not inconsistent with the object and terms of the policy, will be presumed to have been known by the underwriters, and taken into consideration when the contract was made, and will have the same effect as if such usage were inserted in the policy.' The same was held in respect of carrying honey on deck. Orient Mutual Ins. Co. v. Reymershoffer, 56 Texas, 234; Allen v. St. Louis Ins. Co., 85 New York, 473; Rogers v. Mech. Ins. Co., 1 Story (U. S. Circ. Ct.) 603.

"Whether a delay is so unreasonable as to constitute a deviation depends on the nature of the voyage and the usage of the trade.' Columbian Ins. Co. v. Catlett, 12 Wheaton (U. S. Supr. Ct.), 388.

"The principal case is cited in Mobile M. D. & M. Ins. Co. v. McMillan, 27 Alabama, 98, on a question of custom in respect to place of landing, and with it

Roberson v. French, ante. The decision was that although the carrier would be bound to deliver the goods in question at the city of New Orleans, yet the liability on a marine policy would end at Lake Pontchartrain, that being by usage regarded as 'the port of New Orleans.' The marine policy did not cover the subsequent terrene transportation. The Court said: 'We rest our decision upon the terms of the policy itself, considered of course with reference to what is usually done by such a vessel, with such a cargo, in such a voyage, all of which must be considered as forming a part of the policy, as much as if inserted in it. 1 Burr. 350; 3 Saund. 200 a, n. 1. Both the assurer and insured are chargeable with a knowledge of the course of this trade, and are presumed to contract with reference to it.' 'It was certainly competent for the parties to contract for covering losses which should come to the goods upon their marine passage and until safely landed, leaving their overland passage unprotected by the policy. This we have held was the effect of the policy before us.'

"The obligation to employ a pilot is dispensed with by custom. Keller v. Firemen's Ins. Co., 3 Hill (N. Y), 350 (citing Law v. Hollingsworth, 7 T. R. 160); Cox, Maitland & Co. v. Charleston M. & F. Ins. Co., 3 Richardson Law (So. Car.) 331.

"Although it may be usual for steamboats to tow vessels up and down a river, yet in the absence of usage for insurers to pay the expense thereof there is no liability to pay them, Hermann v. West M. & F. Ins. Co., 13 Louisiana, 516."

[Certain Other Offers in Evidence, etc.]

Mr. Denman then offered in evidence the case of Livingstone & Gilchrist v. Maryland Ins. Co., 6 Cranch, 506, the whole of said case to be considered a part hereof and as if copied at length herein.

Mr. Denman then admitted that the policy pleaded by plaintiff had been duly issued by defendant.

This concluded the presentation of evidence.

Mr. Denman thereupon offered to the Court his requested instructions numbered I to XXXII, inclusive, hereinafter described, and asked that they be given to the jury.

[Motion for a Verdict for the Defendant, etc.]

Mr. Denman then moved as follows:

"That the Court instruct the jury to bring in a verdict for the defendant on the following grounds, and on each of them; 1. That the evidence fails to sustain the issue raised by the third amended complaint and the denial of its allegations in the answer thereto. 2. That the evidence conclusively shows that defendant is entitled to a verdict under the affirmative defense set forth in the second defense set forth in the answer to the third amended complaint. 3. That the evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the third defense contained in the answer to the third amended complaint. 4. That the evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense

set forth in the fourth defense contained in the answer to the third amended complaint. 5. The evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the fifth defense contained in the answer to the third amended complaint. 6. The evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the sixth defense contained in the answer to the third amended complaint. 7. The evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the seventh defense contained in the answer to the third amended complaint.

"We move for a verdict on each one of these grounds."

After argument, the motion for an instructed verdict was denied, and Mr. Denman duly took an exception for the defendant.

[Instructions of the Court to the Jury.]

The Court thereupon gave its instructions to the jury as follows:

CHARGE TO THE JURY.

The COURT.—Gentlemen of the jury, I shall ask your careful attention while I submit to you the law that must govern you in reaching a verdict in this case. You all understand, doubtless, that this is an action by the M. S. Dollar Steamship Company vs. The Maritime Insurance Company, to recover on a policy of insurance alleged to have been issued by the defendant to the plaintiff, in the sum of 3,000 pounds

sterling, upon the steamship "M. S. Dollar," the action being to recover the equivalent of 3,000 pounds sterling in money of the United States, which is claimed to be the sum of $14,580, and that is the amount which it is sought to recover under the contract of insurance. I will instruct you thereafter as to how, in the event you should reach a conclusion favorable to the plaintiff, to make up your verdict in that respect; that is in view of the fact that the policy is in pounds sterling, and not in our current coin.

The policy sued on is what is designated in common parlance a war risk policy, and it provides, "This insurance is only to cover those risks excluded by the warranted free of capture, seizure and detention clauses in marine policy or policies, with liberty to run blockades." Now, you will observe therefore that by its terms this insurance covers those risks which are excluded by the warranted free of capture, seizure and detention clause in marine policy or policies; in other words, it is an insurance against capture, seizure and detention and such other risks as are known to insurers as the warranted free of capture, seizure and detention clause in marine policy or policies.

It appears in evidence that an usual form of the "warranted free from capture, seizure and detention" clause in an English policy of marine insurance, as well as in the printed blank of the marine policy in use by defendant, is as follows:

"Warranted free of capture, seizure and detention and the consequences thereof or any attempt

thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war."

Another form introduced in evidence is: "Warranted free from capture, seizure and detention and the consequences of any attempt thereat and all other consequences of hostilities (piracy and barratry excepted)."

In the present case this difference in form is immaterial, because the claim is for loss by capture, seizure and detention, which risks, the evidence discloses, are contained in all the forms of the clause in question, and are also named in the policy as describing the clause itself.

The voyage for which this vessel was insured is described as "at and from San Francisco to Vladivostok, while there, and thence back to a safe neutral port.

She is further expressly given "liberty to run blockade."

These provisions are important. They disclose that both parties to the insurance intended that if necessary a blockade should be run both into and out of Vladivostok.

In case of war between foreign states, neutrals have the right to carry on trade with a belligerent, subject to the other belligerents' right of capture; consequently, the carriage of contraband goods or voyages in breach of blockade are legal, and it necessarily follows that insurance on such goods or voy-

ages are also legal, where the underwriter knows of the intention at the time the policy is made.

In this cause there can be no question about the legality of the insurance, because the policy contains an express permission to run blockade.

Though in some of the older cases the use of what are termed false or simulated papers has been spoken of as criminal, I instruct you that the act is not criminal, and the modern international law does not so regard it.

You have nothing to do with the mere moral aspect of the clearance for a pretended port, or the carriage and presentation of such false or simulated papers. The only question presented for your consideration in that connection is the question as to whether or not the risk of capture or condemnation for so doing is a risk assumed by the insurance company under the terms of its policy of insurance issued to the plaintiff.

The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance the real destination of the vessel was Vladivostok, and the real purpose and intention of defendant was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true the evidence is undisputed that under the law of England where the real destination is the port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of, nor a failure to sail upon, the insured voyage.

A concealment must be with respect to matters within the knowledge of the assured at the time of making the contract, and anything coming to his knowledge after that, however material it may be, need not be communicated to the insurer.

There can be no concealment of an intention to use false papers imputed to the shipowner, if such an intention is necessarily implied from the application for permission to run a blockade.

It has been aptly said by the Supreme Court that when a neutral carrying on a trade from a neutral to a belligerent country asks for permission to run a blockade, it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover their intention to run the blockade, or of the precautions ordinarily resorted to that they may escape detection. Underwriters to whom the extension of trade is always beneficial must and do connive at the practice in silence. They ask no questions, propose their premiums and the contract is as well understood as the most thorough explanation can make it.

A knowledge of the state of the world, of the allegiance of particular countries, of the risk and embarrassments affecting their commerce, of the course and incidents of the trade in which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters.

If you shall find that this contract is made and executed in England, and shall further find from the

evidence that by the law of England, unless the vessel has express permission from the insurer to use false papers, an insurer is discharged where the vessel is condemned for using such papers, then you must further determine from the evidence whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade as a necessary incident thereto.

There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

It is also in evidence that under the law of England "every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself," and further "that what is actually done by such a ship on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed."

If, therefore, you shall find that the permission to run blockade carries with it by implication a permission to use false or simulated papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question, does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers.

In determining what the law of England is as applied to the facts of this case, you should not rely upon the conclusions of a professional witness without a comparison between the facts stated in the

question to which he makes his answer, and the facts as disclosed by the evidence in the case before you. The law as applied to one state of facts may lead to a very different conclusion from that to which it leads under another state of facts.

Neither can you rely upon the statement contained in the text of an author, without considering qualifying statements, if any, in the same text.

In this case the answer of the defendant does not contain a sufficient denial of the averments of the complaint that proper proofs of loss and interest were furnished the defendant by the plaintiff, and for that reason that fact must be taken as admitted.

A blockade may either be instituted by a public declaration of the blockading power, or it may be what is known as a de facto blockade. A de facto blockade exists without such general notification, but by a special notification by a vessel of the blockading squadron. If a neutral vessel is specially warned by a vessel of the blockading squadron, a blockade de facto is proved to exist.

Immediate arrest is sufficient proof of force to blockade.

An insurance company would not be liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, intending to go to Moji and not to Vladivostok and did not change her destination from Moji, Japan, to Vladivostok, Russia, until after she had sailed.

In determining the cause of the condemnation of the steamship "M. S. Dollar," the jury must disre-

gard any evidence of any reason for that condemnation not appearing on the face of the prize decree of the Yokosuka Prize Court, and must assume that the facts found as the basis for the condemnation in the decree of the Yokosuka Prize Court caused the condemnation.

If the jury find that the policy here sued upon was delivered in England to the plaintiff, or its agents, Bowring & Co., then the English law between December, 1904, and May 1, 1905, as to the liability of the insurer thereunder controls its enforcement.

The jury are to disregard any evidence of conversations or negotiations regarding the place of delivery of the policy sued upon, unless it be shown that the defendant knew of such conversation before the delivery of the policy.

Unless the jury find that the steamer "M. S. Dollar" departed from the port of San Francisco on a voyage to Vladivostok, Siberia, and continued on said voyage and was so duly prosecuting the said voyage at the time of the loss sued for, the jury must find for the defendant.

The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar, or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant for that purpose.

In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may

be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they have been disclosed to you what the fact was in that regard here.

If you find that any witness has deliberately told an untruth in any matter, you should view with the greatest care any other testimony of that witness with a view of determining its credibility.

Now, gentlemen of the jury, before I come to some general matters, as I suggested to you I will indicate to you how to arrive at your form of verdict in the event it should be in favor of the plaintiff. If you find for the plaintiff you will find in the money of the United States, at the rate of exchange figured at $4,866 to the pound sterling, and you will include interest from the date of the commencement of the suit, to wit, from November 13, 1905, to date. You will find on one of the forms of verdict, gentlemen, I have made a memorandum which will give you that data. I have noted on one of the forms here, "Amount of verdict, if in favor of plaintiff, to be figured in United States money at $4,866 to the pound sterling, interest to be figured from November 13, 1905, to this date, rate of interest 7%." It will only be necessary to deal with that should your verdict be for the plaintiff. If your verdict should be for the defendant you will find a form which expresses that in a simple manner.

Now, gentlemen, as suggested to you in response to a request from one of the parties, I have stated

to you that if you find a witness has deliberately testified to an untruth, you must view with great care the balance of his testimony. That will indicate to your minds that you necessarily pass on the credibility of witnesses in this case. While the Court gives to the jury the law, and the jury must be bound by it, the jury are exclusively the judges of the facts; and that includes, as I have indicated, the passing upon the credibility of witnesses. You arrive at a conclusion as to whether a witness or the witnesses that have testified before you have been testifying to the truth very much by those same ordinary rules of common sense and every day experience that we have come to use in our intercourse with our fellowmen; you observe their manner upon the stand, the character of their testimony, its inherent probability or improbability standing by itself or when taken in connection with all the other evidence in the case, and you determine what degree of credibility you will accord to any witness? Of course, you have a right to consider whether there has been disclosed in the witness's testimony or otherwise in the case, the fact that he is materially interested in the case, in the outcome, in your verdict, and you have a right, of course, to take that into consideration in determining what motive there might be and how strong that motive might be for the witness to vary from the straight truth. Of course, it almost invariably occurs in every hotly contested case that there is a conflict of evidence between witnesses. That, of course, is for the jury to reconcile, and you do it by employing your judgment and your reason in substantially

the way that I have indicated to you; one witness testifies one way and another witness testifies another; you make up your mind by the rules I have stated to you which one of them is telling the truth; that is called solving a conflict in the testimony. You must apply these rules in determining what the facts are in the case because it is from the testimony of the witnesses and the physical evidence, such as papers and other exhibits that have been put in evidence, that you must determine what the facts of the case are.

Among the facts in this case for the jury to pass upon is one which has given rise to some controversy between counsel as to whether it was a question of fact or a question of law, and that is as to what the law of England was at the time covered by this transaction; one counsel contended and offered a number of very carefully prepared instructions with the request that they be given to the jury, upon the theory that it was the duty of the Court to instruct upon what the law of England was during that period. But that is not the law, gentlemen of the jury. The law of the country, of a tribunal is presumptively within the knowledge of that tribunal, and under the law it is the duty of the Judge to charge the jury as to what the law of this country is; that is a part of his functions, as I have previously indicated to you. It is my province as the Judge of this court to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in

its application to the issues presented in a case like this, is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text-books by recognized authors of law-books on the subject, and that also is a high character of evidence tending to show what the law of the country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to a jury but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result would be otherwise upon this controversy. Therefore it is essential that you determine that fact.

You are aware, gentlemen, that in the Federal Court your verdict must be unanimous.

I have had prepared for you two forms of verdict which you will find to accord with the instructions I have given you; you can fill out the one that meets with your conclusion.

A part of the instructions above given was Plaintiff's Requested Instruction No. II," as follows:

[Instructions to Which Exceptions Were Taken.]

"It appears in evidence that an usual form of the 'warranted free from capture, seizure and detention' clause in an English policy of marine insurance, as well as in the printed blank of the marine policy in use by defendant, is as follows: 'Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war.' "

"Another form introduced in evidence is: 'Warranted free from capture, seizure and detention and the consequences of any attempt thereat and all other consequences of hostilities (piracy and barratry excepted).'

"In the present case this difference in form is immaterial, because the claim is for loss by capture, seizure and detention, which risks, the evidence discloses, are contained in all the forms of the clause in question, and are also named in the policy as describing the clause itself."

To this instruction, Plaintiff's No. II, defendant did duly except, on the ground that the facts as shown in the evidence did not warrant the instruction, and

that it incorrectly states the law controlling the interpretation of the policy sued upon.

A part of the instructions above given was "Plaintiff's Requested Instruction No. VIII," which instruction the Court did modify and give to the jury as follows:

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the real destination of the vessel was Vladivostok, and the real purpose and intention of defendant was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that under the law of England, where the real destination is a port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of nor a failure to sail upon the insured voyage."

To which instruction defendant did duly except, on the ground that it incorrectly states the law and incorrectly states conclusions that can be drawn from the facts shown in the evidence, and further misstates the undisputed facts, so alleged to have been undisputed in the evidence.

A part of the instructions above given was "Plaintiff's Requested Instruction No. XIII," as follows:

"If you shall find that this contract is made and executed in England, and shall further find from the evidence that by the law of England, unless the vessel has express permission from the insurer to use

false papers, an insurer is discharged where the vessel is condemned for using such papers, then you must further determine from the evidence whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade as a necessary incident thereto."

Which instruction the Court did give to the jury and to which instruction the defendant did duly except as last above.

A part of the instructions above given was "Plaintiff's Requested Instruction No. XIIIa," as follows:

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

"It is also in evidence that under the law of Engglland 'every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself,' and further 'that what is usually done by such a ship on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed.'

"If, therefore, you shall find that the permission to run blockade carries with it by implication a permission to use false or simulated papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question, does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers."

To which instruction defendant did duly except on the ground last stated.

A part of the above instructions was "Plaintiff's Requested Instruction No. XIX," as follows:

"A blockade may either be instituted by a public declaration of the blockading power, or it may be what is known as a de facto blockade. A de facto blockade exists without such general notification, but by a special notification by a vessel of the blockading squadron. If a neutral vessel is specially warned by a vessel of the blockading squadron, a blockade de facto is proved to exist.

"Immediate arrest is sufficient proof of force to blockade."

To which instruction defendant did duly except on the ground as last stated.

Defendant thereupon duly excepted to the following of the above instructions:

"Among the facts in this case for the jury to pass upon is one which has given rise to some controversy between counsel as to whether it was a question of fact or a question of law, and that is as to what the law of England was at the time covered by this transaction; one counsel contended and offered a number of very carefully prepared instructions with the request that they be given to the jury, upon the theory that it was the duty of the Court to instruct upon what the law of England was during that period. But that is not the law, gentlemen of the jury The law of the country, of a tribunal is presumptively within the knowledge of that tribunal, and under the law it is the duty of the judge to charge the jury as to what the law of this country is; that is a part of his functions, as I have previously indicated to you. It is my prov-

ince as the Judge of this court to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in its application to the issues presented in a case like this, is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text-books by recognized authors of law-books on the subject, and that also is a high character of evidence tending to show what the law of the country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to a jury, but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result would be otherwise upon this controversy. Therefore it is essential that you determine that fact."

—the exception being as follows:

"We further except to the instructions of the Court to the jury that it must determine the law of Great Britain by the application of their intelligence, without instructions from the Court as to what such law was, as proved by the evidence, upon the ground that this incorretly stated the law, and on the ground that the law is that the Court must instruct the jury as to the law of a foreign country as shown by the evidence adduced."

The defendant thereupon duly excepted to the following of the Court's instructions:

"The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar, or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant for that purpose.

"In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they have been disclosed to you what the fact was in that regard here."

The said exception was as follows:

"Then we except to the instruction to the jury that they might imply from the facts as shown in this case, that the agent of the plaintiff in negotiating for the policy was at the same time the agent for the defend-

ant, on the ground that the evidence does not warrant such an instruction; that there was no evidence from which the jury might infer that the plaintiff's agent was also the agent of the defendant, and on the ground that there was no evidence before the jury to show that such a double agency might have been in this case, and on the further ground that the said instructions tended to lead the jury to infer that it might imply from the facts that such a dual agency existed."

[Instructions Requested and Refused.]

The Court refused to give defendant's requested instruction No. 1, as follows:

"The law of Japan is presumed to be the same as the law of the United States, which is that if a vessel carrying contraband to a port of one of two belligerents,—the contraband cargo not being owned by the owner of the vessel, and the owner of the vessel and its officers being in no way parties to any attempt to conceal its nature—is captured by the opposing belligerents, the capturing belligerent has no right to condemn the vessel for such carriage."

To which refusal defendant duly excepted as follows:

"On the ground that the law in said instruction was correctly stated, and further that the facts as shown in the case conclusively support the instruction sought.

The Court refused to give defendant's requested instruction No. II, as follows:

"The law of Japan is the same as the law of the United States, which is that if the captain of the 'M. S. Dollar' had made no attempt to conceal the destination of the cargo of the 'M. S. Dollar' and its contraband nature, the Japanese courts would have had no right to condemn the said vessel."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. III, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where on a voyage under a policy of insurance such as has been proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a policy for such a loss."

To which refusal defendant duly excepted on the grounds last stated, and on the further grounds that the instruction is proper, and its refusal improper; and on the ground that it was the duty of the Court to instruct the jury as to the law of a foreign country when that law is shown by the evidence; and upon the further ground that the evidence conclusively shows the law of Great Britain to have been as stated in the requested instruction.

The Court refused to give defendant's requested instruction No. IV as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between

Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture,—the insurer under such a policy would not be liable for such a capture and condemnation."

To which refusal defendant duly excepted on the ground that the said instruction setting forth the law of Great Britian is conclusively shown to have been the law of Great Britain as appears from the evidence here adduced; and on the further ground that the evidence shows the instruction to describe the fact as conclusively proved.

The Court refused to give defendant's requested instruction No. V as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the

event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture,—the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers."

To which refusal defendant duly excepted on the same grounds as above stated.

The Court refused to give defendant's requested instruction No. VI, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and

used the first set of papers to evade capture,—the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers, and it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss."

To which refusal defendant duly excepted on the same grounds as above stated.

The Court refused to give defendant's requested instruction No. VII, as follows:

"Where on a voyage under policy of insurance such as has been proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a loss."

To which refusal defendant duly excepted on the same grounds as above stated, and on the further ground that the instruction contains the law of this country, and that the instructions of the Court nowhere else give the law as there stated, and that it was necessary to give that statement of the law to the jury.

The Court refused to give defendant's requested instruction No. VIII, which is as follows:

"Where a vessel sails on a voyage insured by a policy such as has been proved in this case, during

the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture,—the insurer under such a policy would not be liable for such capture and condemnation."

To which refusal the defendant excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. IX as follows:

"Where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and that the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture,—the insurer under such a policy

would not be liable for such a capture and condemnation. And the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers."

To which refusal defendant excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. X, as follows:

"Where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation. And the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such

papers, and it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss."

To which refusal defendant duly excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. XI as follows:

"The law of Great Britain between December 1, 1904, and May 1, 1905, was that an insurance company was not liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, and did not change her destination from Moji, Japan, to Vladivostock, Russia, until after she had sailed.

To which refusal defendant duly excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. XII as follows:

"An insurance company would not be liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, and did not change her destination from Moji, Japan, to Vladivostock, Russia, until after she had sailed."

To which refusal defendant duly excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. XIII as follows:

"In determining the cause of the condemnation of the steamship 'M. S. Dollar,' the jury must disregard any evidence of any reason for that condemnation not

appearing on the face of the prize decree of the Yokosuka Prize Court."

To which refusal defendant duly excepted on the same grounds as the last.

The Court refused to give defendant's requested instruction No. XV as follows:

"Unless the jury find that the plaintiff made to the defendant proof of the loss of the 'M. S. Dollar' claimed in the complaint, before the commencement of this suit, then the jury must find for the defendant."

To which refusal defendant duly excepted, on the same grounds, and on the further ground that the requested instruction states the law as it is in this jurisdiction and on a pertinent matter arising from the state of proof.

The Court refused to give defendant's requested instruction No. XVI as follows:

"Unless the jury find that the policy set forth in the complaint is an usual form of marine policy, then the jury must for the defendant."

To which refusal defendant duly excepted, on the grounds as last stated.

The Court refused to give defendant's requested instruction No. XVII as follows:

"Unless the jury find that the policy sued upon contained at the time of its delivery the 'warranted free of capture, seizure and detention' clause as follows: 'Warranted free of capture, seizure and detention, and the consequence thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike

operations either before or after declaration of war,' the jury must find for defendant."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XVIII as follows:

"The evidence conclusively shows that the policy here in question was delivered to the plaintiff in England."

To which refusal defendant excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XIX as follows:

"The English law at the time between December 1, 1904, and May 1, 1905, controls the interpretation of the terms of this policy and determines the liabilities thereunder."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XXIV as follows:

"The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XXV as follows:

"If the jury find that the act of the plaintiff in clearing the vessel for Moji, Japan, materially in-

creased the risk of capture by the Japanese, the jury must find for the defendant."

To which refusal defendant duly excepted, on the same grounds.

The Court refused to give defendant's requested instruction No. XXVII as follows:

"The jury must view with distrust the evidence of the witness Comyn as to any agreement between the plaintiff and defendant in England to the effect that the policy was not to be delivered in England, the evidence of the agent of the plaintiff in London being stronger and more satisfactory evidence."

To which defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XXVIII as follows:

"If you find that the act of falsely clearing for Moji, Japan, tended to increase the risk of capture, seizure and detention, and if you find that that act contributed to the loss claimed, you must find for the defendant."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XXIX as follows:

"No custom has been shown in this case for a vessel to carry papers falsely showing the destination to be the port of one belligerent when in fact bound for a port of the other belligerent."

To which refusal defendant duly excepted, on the same grounds.

The Court refused to give defendant's requested instruction No. XXX as follows:

"A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of the other belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury cannot regard the underwriters as charged with notice of it."

To which refusal defendant duly excepted on the same grounds.

The Court refused to give defendant's requested instruction No. XXXI as follows:

"The port of Moji is about four days' steaming off the voyage sued on. It is not shown to be a customary coaling port on that voyage. If you find that Captain Cross sailed his vessel from San Francisco intending to go to Moji, and changed his destination to Vladivostock while on the voyage, you must find for the defendant."

To which refusal defendant duly excepted, on the same grounds.

The Court refused to give defendant's requested instruction No. XXXII as follows:

"Whether a vessel did or did not sail on a particular voyage depends upon the determination in her Master's mind at the time of sailing as to the destination. The jury must not regard any testimony showing the determination in the mind of any person other than the Master in actual charge of the vessel at the time of her sailing."

To which refusal defendant duly excepted, on the same grounds.

The jury, after listening to the instructions of the Court, retired, and after deliberating upon its verdict, returned to the Court and rendered a verdict in favor of the plaintiff and against the defendant in the sum of Seventeen Thousand Five Hundred and Thirty-eight and 67/100 Dollars ($17,538.67); and upon said verdict judgment was entered against the defendant and in favor of the plaintiff in the said sum and for plaintiff's costs.

[Prayer for Settlements, etc., of Bill of Exceptions.]

To the Honorable, the said Circuit Court of the United States, and to the Judge thereof:

The above is proposed as a bill of exceptions to the various occurrences at the trial of said cause and the defendant now prays that the same be settled and allowed according to law.

WILLIAM DENMAN,
Attorney for Defendant.

[Order Settling, etc., Bill of Exceptions.]

This matter of the settlement of the above bill of exceptions coming on duly to be heard, the plaintiff being represented by Nathan H. Frank, Esq., and the defendant by William Denman, Esq.; and it appearing that the jury rendered their verdict herein for plaintiff and against defendant in the sum of $17,538.67, on the 24th day of September, 1908, and that judgment was entered thereon on the 24th day of September, 1908; that this court, by its order herein duly given and made, did allow defendant to and including the first day of November, 1908, to serve its proposed bill of exceptions;

That defendant did serve its proposed bill of exceptions on plaintiff on the 31st day of October, 1908;

That on the 29th day of October, 1908, defendant did serve on plaintiff its petition for a new trial herein and that on the 30th day of October, 1908, defendant did file the same with the clerk of this court;

That on the 9th day of November, 1908, plaintiff did serve on defendant its proposed amendments to defendant's proposed bill of exceptions, together with the following document:

(Title of Court and Cause.)

"The plaintiff above named objects to the signing and settlement of any bill of exceptions in the above-entitled cause, upon the ground that the time for signing and settling the same has expired, and that the Court has no jurisdiction in said matter, and reserves all right to insist upon said objection, and, with said reservation, proposes the amendments hereinafter set forth.

"Dated November 10, 1908.

"FRANK & MANSFIELD,

"Attorneys for Plaintiff."

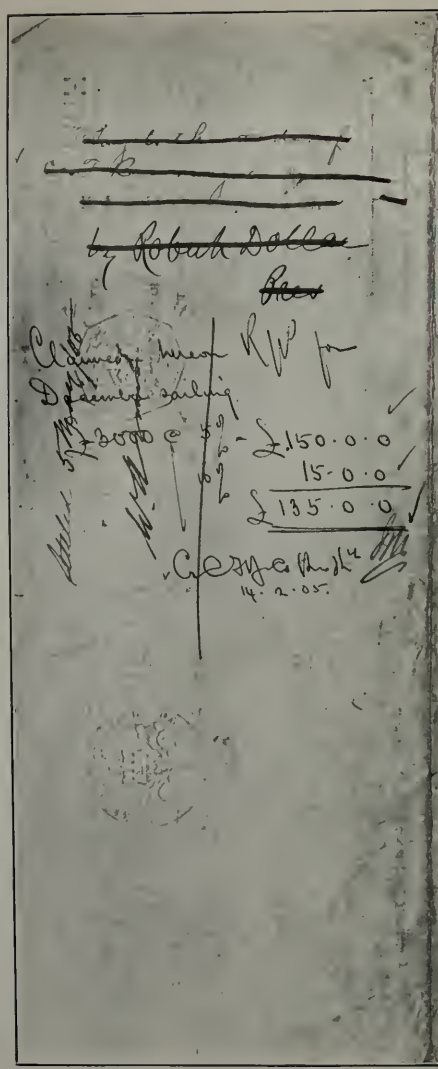
That thereafter and on the 14th day of November, 1908, defendant did deliver to the clerk of said court said proposed bill and proposed amendments and said exceptions; that thereafter the said clerk did deliver all said documents to the judge and thereafter the settlement of said bill of exceptions was by said court continued until after the decision on the motion for a new trial;

That the said motion for a new trial was argued on the 30th day of November, 1908, and was denied

on the 25th day of January, 1909; that thereafter and in said term, the settlement of said bill of exceptions was continued by order of the Court till the March term, 1909; that thereafter and in said March term the Judge did designate a time for the settlement of said bill; that on said day both parties appeared, being represented by counsel, and said plaintiff objected to signing or settling of said bill of exceptions upon the grounds in said notice of November 10th, 1908, set forth; that said objection was overruled, to which said plaintiff excepted; and the said bill was settled in part and defendant ordered to engross the same; that thereafter the settlement of the said bill was continued by order of said court till the July term of said court; and the said bill being now duly engrossed, is this day hereby finally settled, certified and allowed as a true bill of exceptions taken upon the trial of the above action.

Dated August 13th, 1909.

WM. C. VAN FLEET,
Judge.



88564

No. 40/37804 Lyons A/c

It is requested that in case of damage which may involve a claim under this policy, notice, when practicable, be given to Underwriters in order that they may appoint a representative on their behalf.

LONDON AGENCY.

Maritime

Insurance Company Limited,

LIVERPOOL.

London, 22/12 1904

Assured M. S. Dollar ss & Co

Ship M. S. Dollar

Voyage Seattle to Vladivostock

On Hull

£ 3000 @ 2½ per cent.

NOTICE.—The Insured are particularly requested to read their Policies.

HULL.

DIRECTORS
EDWARD H COOKSON. *Chairman.*
J. F. CAROL. *Deputy Chairman.*
ARTHUR W BIBBY.
J. KIRKE CROOKS
ROWLAND E. L. NAYLOR.
WILLIAM S. PATTERSON
JOSHUA SING.

HEAD OFFICE
LIVERPOOL.
BROWN'S BUILDINGS

UNDERWRITER
HAROLD BUMNER

SECRETARY
J. S. NICHOLSON.

BANKERS.
LIVERPOOL—
NORTH & SOUTH WALES BANK, Ltd.
LEYLANDS, CASTLE ST., BRANCH.

Maritime Insurance Company, LIMITED.

LONDON AGENCY.

LONDON AGENCY.
39, CORNHILL, E.C.

AGENT.
WILLIAM ARMIT.

BANKERS.
ROBARTS, LUBBOCK & CO

1/6

Exhibit "B"

No. 37 80 44 Liverpool

£ 3000.

The risk not to commence before the cessation of the previous policies.

Warranted free from Capture, Seizure, or Detention, and the consequences thereof, or of any attempt thereat, Foreign Custom, or per Port Authority Rules, if in accordance with the terms contract of affreightment.

The Warranted and the following as to average notwithstanding each to be payable as if separately insured, and not to the aggregate amount.

Whereas it hath been proposed to the Maritime Insurance Company Limited by M. S. Dollar Steamship Co.

as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described. Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay the said Company the sum of seven hundred and eighteen pounds 10/-

as a premium at and after the rate of twenty five guineas per Cent. for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of three thousand pounds. and promises and agrees with the Insured their Executors, Administrators and Assigns in all respects truly to perform and fulfil the Contract contained in this Policy. And it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from

San Francisco to Vladivostock, while there and thence back to a safe neutral port.

To return 2½ percent for loading on or before 31st December 1904
To return 2½ percent for no claim under this policy.
Warranted to clear on or before 31st January 1905 or held covered at a premium to be arranged.

This insurance is only to cover those risks excluded by the Warranted free of Capture Seizure + detention clause in Marine policy + policies
With liberty to join Hodeida

And it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company so far as concerns this Policy shall be and is as follows

On valued at £

ALL AND MATERIALS, Valued as £ —

MACHINERY AND BOILERS, " £ — £ 37050

+ everything Connected therewith

of the Ship or Vessel called the M. S. Dollar

whereof is at present Master or whoever shall go for Master to the said Ship or Vessel.

In the event of the Vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

With leave to proceed to and from any port and/or dry dock or Docks during the currency of this Policy.

And the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Ship or Vessel at and from as above and shall continue until she is moored at anchor in good safety at her above-mentioned place of Destination and while there however employed until expiry of after such mooring, *or until sailing on next voyage whichever may first occur.* And that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this Insurance. ~~And also to tow and be towed, assist and salve vessels in distress.~~
Voyage &c. Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart, Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this ~~Insurance or any part thereof~~. And in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to use labour and travel for in and about the Defence Safeguard and Recovery of the said subject matter of this Insurance or any part thereof without prejudice to this Insurance ~~to the abandonment of any thing hereinafter mentioned~~. And it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment. And it is further agreed, that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Insured shall in consequence thereof be liable to pay and shall pay to the persons interested in such other Ship or Vessel, or in the freight thereof or in the goods or effects on board thereof any sum or sums of money not exceeding the value of the Ship hereby Insured as valued at the rate of eight pounds per ton on the Registered Tonnage this Company will pay the Insured such proportion of three-fourths of the sums so paid as the sum hereby Insured bears to the value of the Ship hereby Insured *calculated at the rate of eight pounds per ton* or if the value hereby declared amounts to a larger sum than the above-mentioned value and in no case where the liability of the Ship has been contested with our consent in writing this Company will also pay a like proportion of three-fourth part of the costs thereby incurred or paid provided also that this clause shall in no case extend to any sum which the Insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever. ~~Touching~~ It is declared and agreed that the Ship shall be and is warranted free from average under Three Pounds per centum unless general or the ship

~~Warranted free of capture, seizure and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.~~

In Witness whereof the undersigned on behalf of the said Company according to the Articles of Association of the said Company and a Resolution duly passed by the Board of Directors have hereunto set their hands in London, the Twenty second Day of December 1904

Examined

Agent in London.

[Endorsed]: Bill of Exceptions. Filed August 14, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Petition for Writ of Error.

To the Honorable, the Judges of the United States Circuit Court of the Ninth Circuit:

Now comes the Maritime Insurance Company, the defendant in the above-entitled cause, and, feeling itself aggrieved by the verdict of the jury rendered and the judgment entered in the said Circuit Court against it for $17,538.67 and costs on the 24th day of September, 1908, alleges and petitions as follows:

Alleges that within forty days after the rendering of the said verdict and the entry of the said judgment, to wit, on the 29th day of October, 1908, defendant did serve on plaintiff and file herein its petition to this Court for a new trial, and that thereafter, and on the 30th day of November, 1908 (said petition was argued and submitted to said Court and that

the said petition did remain under submission until the 25th day of January, 1909; that on the said day the said Court did deny the said petition;

Now, therefore, the said defendant petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

WILLIAM DENMAN,
Attorney for Defendant.

[Endorsed]: Filed April 14, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, Limited (a Corporation),

Defendant.

Assignments of Error.

Now comes the Maritime Insurance Company, Limited, and files the following assignments of error upon which it will rely in its prosecution of its Writ of Error in the above-entitled cause; on the judgment entered against it therein on the 24th day of September, 1908:

I.

That the United States Circuit Court in and for the said circuit, erred in overruling the demurrer interposed by the defendant, the plaintiff in error, to the third amended complaint being the last complaint filed herein, and in overruling the first ground of said demurrer, to wit, that the said third amended complaint failed to state facts sufficient to constitute a cause of action.

II.

That the said Court erred in overruling the second ground of demurrer interposed by defendant, the plaintiff in error to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible and uncertain and each of them because it cannot be determined therefrom who owned the steamer "M. S. Dollar" at the time of effecting the said insurance and at the time of the loss sued for, or that plaintiff had an insurable interest in her at said times.

III.

That the said Court erred in overruling the third

ground of demurrer interposed by defendants, the plaintiff in error to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible and uncertain and ambiguous and each of them in this: that it cannot be ascertained therefrom what the risks are that are referred to as covered by the insurance mentioned in paragraph next to the last on the 1st page of the exhibit attached to the said third amended complaint.

IV.

That the said Court erred in overruling the fourth ground of demurrer interposed by defendant, the plaintiff in error, to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible uncertain and ambiguous and each of them in this: that it cannot be ascertained therefrom what the clause is which is referred to as the "capture, seizure and detention clause" in the paragraph of the exhibit attached to the said third amended complaint, last described.

V.

That the said Court erred in overruling the fifth ground of demurrer interposed by defendant, the plaintiff in error, to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible uncertain and ambiguous and each of them

in this: that it cannot be ascertained therefrom what the "maritime policy or policies" are which are referred to in the said paragraph of the exhibit hereinabove described.

VI.

That the said Court erred in overruling the sixth ground of demurrer interposed by defendant, the plaintiff in error, to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said complaint is unintelligible and uncertain and each of them in this: that the written contract set out and relied upon insures against risks excluded by a certain clause "in marine policy or policies," while in paragraph IV of the said third amended complaint the insurance is described as against risks excluded by a certain clause in an "usual form" of insurance policy.

VII.

That the said Court erred in overruling the seventh ground of demurrer interposed by defendant, the plaintiff in error, to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible and uncertain and each of them in this: that it cannot be determined therefrom whether the clause alleged in paragraph IV thereof to have been canceled, was canceled before or after the execution of the instrument.

VIII.

That the said Court erred in overruling the eighth

ground of demurrer interposed by defendant, the plaintiff in error, to the third amended complaint filed in the said cause, which ground of demurrer was as follows, to wit:

That the said third amended complaint is unintelligible and uncertain and each of them in this: that it cannot be determined therefrom (a) by what court, if any, the condemnation or confiscation mentioned in paragraph VII of said third amended complaint was decreed, if at all, (b) what decree, if any, was rendered by said court, (c) what the facts were that duly authorized the seizure mentioned in said paragraph.

IX.

That the said Court erred in denying the motion of the defendant and plaintiff in error, to strike out the testimony of the witness Dollar to the effect that "we had private advices from Japan that the port was blockaded."

X.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out the testimony of the witness Dollar as to the presence of torpedoes or mines or other obstructions in the harbor of Vladivostok.

XI.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out testimony of Captain Dollar as to the sailing of the vessel to Vladivostok.

XII.

That the said Court erred in overruling the objec-

tion of defendant and plaintiff in error to the following question of plaintiff to the witness Comyn; "You are the gentleman who procured the insurance herein in question are you?" and in allowing said question.

XIII.

That the said Court erred in overruling the objection of defendant and plaintiff in error to the following question of plaintiff to the witness Comyn: "State if you can what the conditions were that were agreed upon between you and the gentleman negotiating for the policy with respect to the place of the delivery of the policy, and the place for the payment of the premiums," and in allowing said question.

XIV.

That the said Court erred in denying defendant's, plaintiff's in error, motion at the conclusion of the witness Comyn's testimony to strike out certain testimony, as follows: "We move to strike out all the testimony of the witness Comyn as to conversations or negotiations agreeing or looking to and agreement that the policy here sued upon was to be delivered in San Francisco, on the ground that the same is irrelevant, incompetent, immaterial and hearsay."

XV.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out, as follows: "We now move to strike out all the testimony of the witness Comyn as to conversations or negotiations agreeing or looking to and agreement

that the policy here sued upon was to be delivered or deemed to be delivered or the delivery deemed to be withheld until the premium was paid, in San Francisco, on the ground that the same is irrelevant, incompetent and immaterial," being the motion made after all plaintiff's testimony had been put in.

XVI.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out the testimony of Captain Dollar that the vessel sailed on a voyage to Vladivostok and in refusing to strike out the said testimony, being the motion made by defendant after all the testimony of the plaintiff had been put in.

XVII.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out the testimony of Captain Dollar as to the clearance of the vessel and in refusing to strike out the said testimony, being the motion made by defendant after all of plaintiff's case was in.

XVIII.

That the said Court erred in denying the motion of defendant and plaintiff in error to strike out certain testimony, made at the conclusion of plaintiff's case, as follows:

"I move to strike out all the testimony concerning conversations regarding the prepayment of the premium as a consideration for the writing of the policy, upon the ground that they are immaterial, irrelevant, in competent, hearsay, and cannot be used to vary the written instrument."

XIX.

That the said Court erred in refusing to grant the motion of defendant said plaintiff in error to amend the answer to the third amended complaint to correspond with the proofs adduced by the testimony of the British Counsel by the insertion after the word "papers" on line 29 of page 10 of the answer, of the words "and used them to conceal the destination of her cargo or its contraband nature."

XX.

That the said Court erred in denying the motion of defendant and plaintiff in error, made after all the evidence was in, for an instruction for a verdict for the defendant, as follows:

"That the Court instruct the jury to bring in a verdict for the defendant on the following grounds, and on each of them:

1. That the evidence fails to sustain the issue raised by the third amended complaint and the denial of its allegations in the answer thereto. 2. That the evidence conclusively shows that defendant is entitled to a verdict under the affirmative defense set forth in the second defense set forth in the answer to the third amended complaint. 3. That the evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the third defense contained in the answer to the third amended complaint. 4. That the evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the fourth defense contained in the answer to the third amended complaint. 5. The evi-

dence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the fifth defense contained in the answer to the third amended complaint. 6. The evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the sixth defense contained in the answer to the third amended complaint. 7. The evidence conclusively shows that the defendant is entitled to a verdict under the affirmative defense set forth in the seventh defense contained in the answer to the third amended complaint."

XXI.

That the said Court erred in giving the following instruction requested by plaintiff and defendant in error:

"It appears in evidence that an usual form of the 'warranted free from capture, seizure and detention' clause in an English policy of marine insurance, as well as in the printed blank of the marine policy in use by defendant, is as follows: 'Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat, piracy excepted and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war.' "

"Another form introduced in evidence is: 'Warranted free from capture, seizure and detention and the consequences of any attempt thereat and all other consequences of hostilities (piracy and barratry excepted).' "

"In the present case this difference in form is immaterial, because the claim is for loss by capture, seizure and detention, which risks, the evidence discloses, are contained in all the forms of the clause in question, and are also named in the policy as describing the clause itself."

XXII.

That the said Court erred in giving the following instruction requested by plaintiff and defendant in error:

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the real destination of the vessel was Vladivostok, and the real purpose and intention of defendant was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that under the law of England, where the real destination is a port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of or a failure to sail upon the insured voyage."

XXIII.

That the said Court erred in giving the following instruction requested by plaintiff and defendant in error:

"If you shall find that this contract is made and executed in England, and shall further find from the evidence that by the law of England, unless the vessel has express permission from the insurer to use false papers, an insurer is discharged where the vessel is condemned for using such papers, then you

must further determine from the evidence whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade as a necessary incident."

XXIV.

That the said Court erred in giving the following instruction requested by plaintiff and defendant in error:

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

"It is also in evidence that under the law of England 'every underwriter is presume to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself,' and further 'that what is usually done by such a ship on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed.' (1 Arnould, 7th Ed., sec. 57.)

"If, therefore, you shall find that the permission to run blockade carries with it a permission to use false papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question, does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers.

XXV.

That the said Court erred in giving the follow-

ing instruction requested by plaintiff and defendant in error:

"A blockade may either be instituted by a public declaration of the blockading power, or it may be what is known as a de facto blockade. A de facto blockade exists without such general notification, but by a special notification by a vessel of the blockading squadron. If a neutral vessel is specially warned by a vessel of the blockading squadron, a blockade de facto is proved to exist.

"Immediate arrest is sufficient proof of force to blockade."

XXVI.

That the said Court erred in giving, in the course of its charge to the jury the following instruction:

"Among the facts in this case for the jury to pass upon is one which has given rise to some controversy between counsel as to whether it was a question of fact or a question of law, and that is as to what the law of England was at the time covered by this transaction; one counsel contended and offered a number of very carefully prepared instructions with the request that they be given to the jury, upon the theory that it was the duty of the Court to instruct upon what the law of England was during that period. But that is not the law, gentlemen of the jury. The law of the country, of a tribunal is presumptively within the knowledge of that tribunal, and under the law it is the duty of the judge to charge the jury as to what the law of this country is; that is a part of his function, as I have previously indicated to

you. It is my province as the Judge of this court to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in its application to the issues presented in a case like this, is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text-books by recognized authors of law-books on the subject, and that also is a high character of evidence tending to show what the law of a country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to a jury, but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result would be

otherwise upon this controversy. Therefore it is essential that you determine that fact."

XXVII.

That the said Court erred in giving, in the course of its charge to the jury, the following instruction:

"The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar, or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant for that purpose.

"In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they may have been disclosed to you what the fact was in that regard here."

XXVIII.

That the said Court erred in refusing to give to the jury instruction No. I requested by the defendant and plaintiff in error, as follows:

"The law of Japan is presumed to be the same as the law of the United States, which is that if a vessel carrying contraband to a port of one of two belligerents—the contraband cargo not being owned by the owner of the vessel, and the owner of the vessel and its officers being in no way parties to any attempt to conceal its nature—is captured by the opposing

belligerents, the capturing belligerent has no right to condemn the vessel for such carriage."

XXIX.

That the said Court erred in refusing to give to the jury instruction No. II requested by the defendant and plaintiff in error, as follows:

"The law of Japan is the same as the law of the United States, which is that if the captain of the 'M. S. Dollar' had made no attempt to conceal the destination of the cargo of the 'M. S. Dollar' and its contraband nature, the Japanese courts would have had no right to condemn the said vessel."

XXX.

That the said Court erred in refusing to give to the jury instruction No. III requested by the defendant and plaintiff in error, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where on a voyage under a policy of insurance such as has been proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a policy for such a loss."

XXXI.

That the said Court erred in refusing to give to the jury instruction No. IV requested by the defendant and plaintiff in error, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely

to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation."

XXXII.

That the said Court erred in refusing to give to the jury instruction No. V requested by the defendant and plaintiff in error, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostok, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the in-

surer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers."

XXXIII.

That the said Court erred in refusing to give to the jury instruction No. VI requested by the defendant and plaintiff in error, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostok, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notori-

ous that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers, and it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss."

XXXIV.

That the said Court erred in refusing to give to the jury instruction No. VII requested by the defendant and plaintiff in error, as follows:

"Where on a voyage under policy of insurance such as has been proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a loss."

XXXV.

That the said Court erred in refusing to give to the jury instruction No. VIII requested by the defendant and plaintiff in error, as follows:

"Where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostok, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set

of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation."

XXXVI.

That the said Court erred in refusing to give to the jury instruction No. XI requested by the defendant and plaintiff in error, as follows:

"The law of Great Britain between December 1, 1904, and May 1, 1905, was that an insurance company was not liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, and did not change her destination from Moji, Japan, to Vladivostok, Russia, until after she had sailed."

XXXVII.

That the said Court erred in refusing to give to the jury instruction No. XII requested by the defendant and plaintiff in error, as follows:

"An insurance company would not be liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, and did not change her destination from Moji, Japan, to Vladivostok, Russia, until after she had sailed."

XXXVIII.

That the said Court erred in refusing to give to the jury instruction No. XIII requested by the defendant and plaintiff in error, as follows:

"In determining the cause of the condemnation of the steamship 'M. S. Dollar,' the jury must disregard any evidence of any reason for that condemnation

not appearing on the face of the prize decree of the Yokosuka Prize Court."

XXXIX.

That the said Court erred in refusing to give to the jury instruction No. XVIII requested by the defendant and plaintiff in error, as follows:

"The evidence conclusively shows that the policy here in question was delivered to the plaintiff in England."

XL.

That the said Court erred in refusing to give to the jury instruction No. XIX requested by the defendant and plaintiff in error, as follows:

"The English law at the time between December 1, 1904, and May 1, 1905, controls the interpretation of the terms of this policy and determines the liabilities thereunder."

XLI.

That the said Court erred in refusing to give to the jury instruction No. XXIV requested by the defendant and plaintiff in error, as follows:

"The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant."

XLII.

That the said Court erred in refusing to give to the jury instruction No. XXVII requested by the defendant and plaintiff in error, as follows:

"The jury must view with distrust the evidence of the witness Comyn as to any agreement between

the plaintiff and defendant in England to the effect that the policy was not to be delivered in England, the evidence of the agent of the plaintiff in London being stronger and more satisfactory evidence."

XLIII.

That the said Court erred in refusing to give to the jury instruction No. XXVIII requested by the defendant and plaintiff in error, as follows:

"If you find that the act of falsely clearing for Moji, Japan, tended to increase the risk of capture, seizure and detention, and if you find that that act contributed to the loss claimed, you must find for the defendant."

XLIV.

That the said Court erred in refusing to give to the jury instruction No. XXIX requested by the defendant and plaintiff in error, as follows:

"No custom has been shown in this case for a vessel to *carry falsely* showing the destination to be the port of one belligerent when in fact bound for a port of the other belligerent."

XLV.

That the said Court erred in refusing to give to the jury instruction No. XXX requested by the defendant and plaintiff in error, as follows:

"A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of the other belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury cannot regard the underwriters as charged with notice of it."

XLVI.

That the said Court erred in refusing to give to the jury instruction No. XXXI requested by the defendant and plaintiff in error, as follows:

"The port of Moji is about four days' steaming off the voyage sued on. It is not shown to be a customary coaling port on that voyage. If you find that Captain Cross sailed his vessel from San Francisco intending to go to Moji, and changed his destination to Vladivostok while on the voyage, you must find for the defendant."

XLVII.

That the said Court erred in refusing to give to the jury instruction No. XXXII requested by the defendant and plaintiff in error, as follows:

"Whether a vessel did or did not sail on a particular voyage depends upon the determination in her Master's mind at the time of sailing as to the destination. The jury must not regard any testimony showing the determination in the mind of any person other than the Master in actual charge of the vessel, at the time of her sailing."

Wherefore, said Maritime Insurance Company, Limited, defendant and plaintiff in error, prays that the judgment aforesaid may be reversed, annulled and held for nothing and that it may be restored to all things that it has lost by occasion of the said judgment.

WILLIAM DENMAN,

Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Filed April 14, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the March term, A. D. 1909, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city of San Francisco, on —— the ———— day of April, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable WM. C. VAN FLEET, District Judge.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Order Allowing Writ of Error.

Whereas, it appears that the Maritime Insurance Company, the defendant in the above-entitled action, feels aggrieved by the verdict of the jury rendered and the judgment for $17,538.67 and costs, entered against it in this court on the 24th day of September, 1908, and has filed a petition for a writ of error; and,

Whereas, it appears that within forty days after the rendering of the said verdict and the entry of the

said judgment, to wit, on the 29th day of October, 1908, defendant did serve on plaintiff and file herein its petition to this Court for a new trial, and that thereafter and on the 30th day of November, 1908, said petition was argued and submitted to said Court and that the said petition did remain under submission until the 25th day of January, 1909; that on the said day the said Court did deny the said petition; and,

Whereas, the defendant has filed herein its assignment of errors:

Now, therefore, it is ordered that a writ of error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the said judgment;

And it is further ordered that the amount of the bond on the said writ of error be fixed at the sum of Twenty-seven thousand and five hundred $27,500.00 dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on said writ of error;

And it is further ordered that upon the filing of said bond duly executed by the American Bonding Company of Baltimore or any other surety company stipulated to by the plaintiff, all further proceedings herein, including execution on said judgment, be suspended and stayed until the final determination of said writ of error by said United States Circuit Court of Appeals, and until the further order of this Court.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed April 14, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY LIMITED (a Corporation),

Defendant.

Stipulation for Bond.

It is hereby stipulated by and between the parties hereto that the bond on writ of error and for a stay of execution herein shall be fixed at Twenty-seven Thousand Five Hundred Dollars ($27,500), with the American Bonding Company at Baltimore, Maryland as surety thereon.

April 14, 1909.

FRANK and MANSFIELD,
Attorney for Plaintiff.
WILLIAM DENMAN,
Attorney for Defendant.

[Endorsed]: Filed April 14, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),

Plaintiff,

vs.

MARITIME INSURANCE COMPANY LIMITED (a Corporation),

Defendant,

Bond on Writ of Error.

Know all Men by These Presents, that we, Maritime Insurance Company, Limited, a corporation, as principal, and American Bonding Company of Baltimore, Maryland, a corporation as surety, are held and firmly bound unto M. S. Dollar Steamship Company, a corporation, plaintiff above named, in the sum of Twenty-seven Thousand Five Hundred Dollars ($27,500) to be paid to the said M. S. Dollar Steamship Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents. And we further agree that in case of a breach of any condition of this bond the said Court may, upon notice to us of not less than ten days, proceed summarily in this action to ascertain the amount which we are bound to pay on

account of said breach, and render judgment therefor against us and award execution therefor.

Sealed with our seals and dated the 15th day of April, 1909.

Whereas, the above-named defendant, Maritime Insurance Company, Limited, has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the Northern District of California.

Now, therefore, the condition of this obligation is such that if the above-named Maritime Insurance Company, Limited, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof the said corporations have hereunto affixed their hands this 15th day of April, A. D. 1909, by their agents thereunto duly authorized.

MARITIME INSURANCE COMPANY, LIMITED,

By LIVINGSTON, SMITH & CO.,

Agents.

AMERICAN BONDING COMPANY OF BALTIMORE,

[Seal American Bonding Company.]

By JOY LICHTENSTEIN,

Agent and Attorney in Fact.

Taken and acknowledged this 15th day of April, 1909, before me.

[Seal] FRANCIS KRULL,
United States Commissioner, North'n Dist. of California.

Approved.
Apl. 16, 1909.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed April 16, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,835.

M. S. DOLLAR STEAMSHIP COMPANY (a Corporation),
Plaintiff,

vs.

MARITIME INSURANCE COMPANY, LIMITED (a Corporation),
Defendant,

Certificate of Clerk U. S. Circuit Court to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing three hundred and fifty-four (354) pages, numbered from 1 to

354, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of the foregoing return to Writ of Error is $212.50; that said amount was paid by William Denman, Esq., attorney for defendant, and that the original Writ of Error and Citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Circuit Court, this 16th day of August, A. D. 1909.

[Seal] SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Writ of Error—Original.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Maritime Insurance Company, Limited, a corporation, plaintiff in error, and M. S. Dollar Steamship Company, a Corporation, Defendant in Error, a manifest error hath happened to the great

damage of the said Maritime Insurance Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 15th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 16th day of April, in the year of our Lord One Thousand Nine Hundred and Nine.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

W. C. VAN FLEET,

Judge.

Service of within Writ and receipt of a copy thereof is hereby admitted this 16th day of April, 1909.

FRANK and MANSFIELD,
NATHAN H. FRANK,
Attorneys for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: No. 13,835. Circuit Court of the United States, Ninth Circuit, Northern District of California. Maritime Insurance Company, Limited, a Corporation, Plaintiff in Error, vs. M. S. Dollar Steamship Company, a Corporation, Defendant in Error. Writ of Error. Filed April 17th, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation—Original.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the M. S. Dollar Steamship Company, a Corporation, and Frank and Mansfield, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 15th day of May, being within thirty days from the date hereof, pursuant to a writ of error on file in the Clerk's office of the Circuit Court of the United States, for the Northern District of California in that certain action number 13,836, wherein Maritime Insurance Company, Limited, a Corporation, is plaintiff in error and you, said M. S. Dollar Steamship Company, a Corporation, are defendant in error, to show cause, if any there be, why the judgment rendered against the said Maritime Insurance Co., as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 16th day of April, A. D. 1909.

W. C. VAN FLEET,
United States Dist. Judge.

Service of within Citation, by copy, admitted this 16th day of April, A. D. 1909.

FRANK and MANSFIELD,
NATHAN H. FRANK,
Attorneys for Defendant in Error.

[Endorsed]: No. 13,835. In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California. Maritime Insurance Company, Limited, a Corporation, Plaintiff in Error, vs. M. S. Dollar Steamship Company, a Corporation, Defendant in Error. Citation. Filed April 17th, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 1753. United States Circuit Court of Appeals for the Ninth Circuit. The Maritime Insurance Company, Limited (a Corporation), Plaintiff in Error, vs. The M. S. Dollar Steamship Company (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed August 16, 1909.

F. D. MONCKTON,
Clerk.

No. 1753

U. S. CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE MARITIME INSURANCE COMPANY (a corporation),

Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY (a corporation),

Defendant in Error.

Brief of Plaintiff in Error, Defendant Below.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

WILLIAM DENMAN,
Attorney for Maritime Insurance Co.

354 California Street,
San Francisco, California.

McQUEEN, WASHINGTON

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No. 1753

U. S. Circuit Court of Appeals

For the Ninth Circuit.

THE MARITIME INSURANCE COMPANY (a corporation),
Plaintiff in Error,
vs.
THE M. S. DOLLAR STEAMSHIP COMPANY (a corporation),
Defendant in Error.

Brief of Plaintiff in Error, Defendant Below.

Statement of the Case.

This is a suit on a policy of marine insurance issued during the Russo-Japanese War to the agent in London of the defendant in error, insuring the hull of the steamer *M. S. Dollar* against certain war risks while on a voyage from San Francisco to Vladivostok. The defendant insurance company, plaintiff in error, is an English corporation, and the policy was delivered in England to the *insured's* agent, Bowring & Co., Limited, on the consideration, expressed on the face of the policy, of the *promise* to pay a certain premium.

The premium was nominally 25 per cent, but 5 per cent was to be returned should she sail before a certain date (subsequent to her actual departure) and 5 per cent further if there were no claim under the policy.

The vessel sailed from San Francisco on December 31, 1904. She was boarded by the Japanese in passing through the Tsugaru Straits, just north of the Island of Nippon, her papers were discovered to be false, and she was taken to Yokosuka, where she was finally condemned by the Japanese Prize Court. The prize decree placed the condemnation on the ground that she was using the papers as a false means to evade capture.

These false papers gave Moji, Japan, *the port of one of the two belligerents*, as the destination of the vessel. The port of Moji is several days' steaming to the south of any of the routes from San Francisco to Vladivostok and is not a coaling port for the voyage to the latter place.

The using of papers to such a designation instead of to a *neutral* port was a negligence so gross as to raise a question of bad faith. The taking out of the papers at the San Francisco Custom House would at once suggest to the Japanese officials to examine the importers and merchants at Moji and determine whether such a cargo was in fact destined there. There were also Russian cruisers sailing in these waters at that time, who might have captured her, and the Russian Government would have been quite as likely as the Japanese to condemn her for the statement of her log, showing an attempted voyage to Vladivostok by the northern route, on the theory that the Moji papers described the true destination and the log was a false means to evade Russian capture.

The industry of opposing counsel has not discovered any case where the false papers used to prevent capture were to a port of one of the two warring nations, much less a custom to use such papers. None of the insured's experts, either in maritime law or warfare, testify to such a custom, the papers of which they had knowledge being made out to neutral ports. This is necessarily so, for the reason that carrying them made out to one of the belligerents not only would not have decreased the risk of capture, but would have doubled the exposure.

The vessel carried full insurance. She was bought back from the Japanese by Mr. Dollar, but whether the price of repurchase made the user of this extraordinary device to evade (?) capture a profitable one, the record does not show. As the law of Great Britain, where the policy was delivered, protects the insurer from losses pro-

ceeding from the use by the insured of such papers, whether profitable or not, it is not necessary to go into this phase of the case however much light it might have thrown upon the motives of the company in declining to pay the claim.

The vessel was not owned by the insured corporation, but by the Dollar Company, Limited, a British Columbia corporation. It is not shown that the company suing owned any of the stock of the M. S. Dollar Company, Limited. The interest of the defendant in error at the time of the issuance of the policy is described by its president as

> "At the *time of the issuance* of this policy of insurance the steamship was operated by the San Francisco corporation, who took the profits, stood the expense, and operated her as owner, under an arrangement whereby all the profits were to go to the California corporation, and the California corporation was to take entire management and control of the ship and the business." (p. 135.)

What the interest of the defendant in error was *at the time of the loss* was not shown, although it was placed in issue by the pleadings (p. 97, lines 11, 12). There is no evidence as to how long the "arrangement" whereby the profits were to go to the San Francisco corporation was to continue; or what charter moneys, if any, it paid to the British Columbia corporation for the right to take the profits of her voyage, or voyages, if more than one. There is no evidence of the amount of the profits, if any.

The defenses of the company, relied upon at the trial, were (1) That under the law of Great Britain an insurer against capture, seizure and detention, is not liable for a loss arising from the use of false papers to evade capture (Answer, 3d Defense, pp. 102–106); (2) That although the insurance of the *M. S. Dollar* was for a voyage to

Vladivostok, the captain failed to sail on that voyage, as his intention on departing from San Francisco was to go to Moji, and he changed his destination to Vladivostok only after he was en route (Answer, 7th Defense, pp. 112–114); (3) That the use of false papers to the port of one warring nation, when the cruisers of both were likely to be encountered on the voyage, was an act of the insured tending to *increase* the risk; and as the use of such papers caused the loss, the insurers are not liable (Answer, p. 108, par. V); (4) That the insured did not own the vessel but merely had the right to operate her and take her profits for a period not stated, and at a charter price also not stated; that the hull valuation, therefore, is not the measure of the insured's injury by the loss of the vessel; that it failed to show what the profits from the operation of the vessel were, or that there were any, and hence that it has suffered any damage (Answer, p. 96, par. VII).

Assignments of Error Relied Upon.

The defendant below moved for an instruction for a verdict, relying on its establishment of the first three of the above defenses, and on the failure of the plaintiff below to sustain its burden of proof as to its damages. The motion was denied, and an exception duly taken (p. 334), the denial being assigned as error (p. 337).

The assignments of error seem voluminous, but they may be simply grouped under the above four heads, as follows:

1a.

The error of the Court in refusing to construe the contract for the jury in the light of the law of England, as shown by the evidence; or to instruct the jury as to the law of England, as so shown.

XXVI. The Court erred in giving, in the course of its charge to the jury the following instruction:

Among the facts in this case for the jury to pass upon is one which has given rise to some controversy between counsel as to whether it was a question of fact or a question of law, and that is as to what the law of England was at the time covered by this transaction; one counsel contended and offered a number of very carefully prepared instructions with the request that they be given to the jury, upon the theory that it was the duty of the Court to instruct upon what the law of England was during that period. But that is not the law, gentlemen of the jury. The law of the country, of a tribunal, is presumptively within the knowledge of that tribunal, and under the law it is the duty of the judge to charge the jury as to what the law of this country is; that is a part of his function, as I have previously indicated to you. It is my province as the Judge of this Court to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in its application to the issues presented in a case like this [*i. e.* the construction of a written instrument], is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text-books by recognized authors of law-books on the subject, and that also is a high character of evidence tending to show what the law of a country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to

a jury, but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result would be otherwise upon this controversy. Therefore it is essential that you determine that fact. (p. 381–383.)

XXX. The Court erred in refusing to give to the jury instruction No. III requested by the defendant and plaintiff in error, as follows:

It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where on a voyage under a policy of insurance such as has been proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a policy for such a loss. (p. 384.)

XXXI. The Court erred in refusing to give to the jury instruction No. IV requested by the defendant and plaintiff in error, as follows:

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostok, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation." (pp. 384, 385.)

XXXII. Same, with addition of words: And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers. (p. 386.)

XXXIII. Same, with addition of words: And it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss. (p. 387.)

XXII. The Court erred in giving the following instruction requested by plaintiff and defendant in error.

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the real destination of the vessel was Vladivostok, and the real purpose and intention of *defendant* was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that under the law of England, where the real destination is a port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of or a failure to sail upon the insured voyage. (p. 379.)

1b.

The errors in permitting the jury to consider the delivery of the policy by the Insurance Company in San Francisco, when the person who handed the policy to the insured in San Francisco is admitted to have received it from the insured's agent in London, and was not shown to have been an agent of the insurer for that or any other purpose.

XIII. The Court erred in overruling the objection of defendant and plaintiff in error to the following question of plaintiff to the witness Comyn:

"State if you can what the conditions were that were agreed upon between you and the gentleman negotiating for the policy with respect to the place of the delivery of the policy, and the place for the payment of the premiums," and in allowing said question. (p. 375.)

XIV. The Court erred in denying defendant's, plaintiff's in error, motion at the conclusion of the witness Comyn's testimony to strike out certain testimony, as follows: "We move to strike out all the testimony of the witness Comyn as to conversations or negotiations agreeing or looking to an agreement that the policy here sued upon was to be delivered in San Francisco, on the ground that the same is irrelevant, incompetent, immaterial and hearsay." (p. 375.)

XV. The Court erred in denying the motion of defendant and plaintiff in error to strike out, as follows: "We now move to strike out all the testimony of the witness Comyn as to conversations or negotiations agreeing or looking to an agreement that the policy here sued upon was to be delivered or deemed to be delivered or the delivery deemed to be withheld until the premium was paid, in San Francisco, on the ground that the same is irrelevant, incompetent and immaterial," being the motion made after all plaintiff's testimony had been put in. (pp. 375, 376.)

XXXIX. The Court erred in refusing to give to the jury instruction No. XVIII requested by the defendant and plaintiff in error, as follows:

"The evidence conclusively shows that the policy here in question was delivered to the plaintiff in England." (p. 389.)

2

The error in instructing the jury that the plaintiff's witnesses had testified that the Maritime Insurance Company purposed and intended at all times that the vessel should go

to Vladivostok notwithstanding her clearance for Moji, when they had given no evidence at all as to the insurer's intent; and in instructing them that the Dollar Company's witnesses testified that at all times the real destination of the vessel was Vladivostok, when the captain had testified, on the Dollar's behalf, that he left San Francisco intending to sail for Moji, Japan, and did not change his destination to Vladivostok until she was en route.

XXII. The Court erred in giving the following instruction requested by plaintiff and defendant in error:

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the real destination of the vessel was Vladivostok, and the real purpose and intention of defendant was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that under the law of England, where the real destination is a port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of or a failure to sail upon the insured voyage." (p. 379.)

XVI. The Court erred in denying the motion of defendant and plaintiff in error to strike out the testimony of Captain Dollar that the vessel sailed on a voyage to Vladivostok and in refusing to strike out the said testimony, being the motion made by defendant after all the testimony of the plaintiff had been put in. (p. 376.)

XLV. The Court erred in refusing to give to the jury instruction No. XXX requested by the defendant and plaintiff in error, as follows:

"A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of the other belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury can not regard

the underwriters as charged with notice of it." (p. 390.)

XLVI. The Court erred in refusing to give to the jury instruction No. XXXI requested by the defendant and plaintiff in error, as follows:

"The port of Moji is about four days' steaming off the voyage sued on. It is not shown to be a customary coaling port on that voyage. If you find that Captain Cross sailed his vessel from San Francisco intending to go to Moji, and changed his destination to Vladivostok while on the voyage, you must find for the defendant." (p. 391.)

3

Errors of the Court in refusing to leave to the jury the question whether the clearance of the vessel by the president of the insured company, and the furnishing of false papers showing a voyage to the opposing belligerent, and not to a neutral port, tended to increase the risk; and to instruct them that if it did the loss therefrom being caused by the direct malfeasance of the insured, the insurer was not liable.

XXVIII. The Court erred in refusing to give to the jury instruction No. I requested by the defendant and plaintiff in error, as follows:

"The law of Japan is presumed to be the same as the law of the United States, which is that if a vessel carrying contraband to a port of one of two belligerents—the contraband cargo not being owned by the owner of the vessel and the owner of the vessel and its officers being in no way parties to any attempt to conceal its nature—is captured by the opposing belligerents, the capturing belligerent has no right to condemn the vessel for such carriage." (pp. 383, 384.)

XLIII. The Court erred in refusing to give to the jury instruction No. XXVIII requested by the defendant and plaintiff in error, as follows:

"If you find that the act of falsely clearing for Moji, Japan, tended to increase the risk of capture, seizure and detention, and if you find that that act contributed to the loss claimed, you must find for the defendant." (p. 390.)

XLIV. The Court erred in refusing to give to the jury instruction No. XXIX requested by the defendant and plaintiff in error, as follows:

"No custom has been shown in this case for a vessel to *carry* (*papers*) *falsely* showing the destination to be the port of one belligerent when in fact bound for a port of the other belligerent." (Word "papers" inserted. See p. 362.) (p. 390.)

XLV. The Court erred in refusing to give to the jury instruction No. XXX requested by the defendant and plaintiff in error, as follows:

"A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of the other belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury can not regard the underwriters as charged with notice of it." (p. 390.)

4

Error of the Court in refusing to instruct a verdict for the Insurance Company on their failure to show the amount of the profits, if any, they had lost by the capture of the vessel.

XX. The Court erred in denying the motion of defendant and plaintiff in error, made after all the evidence was in, for an instruction for a verdict for the defendant, as follows:

"That the Court instruct the jury to bring in a verdict for the defendant on the following grounds, and on each of them:

"1. That the evidence fails to sustain the issue raised by the third amended complaint and the denial of its allegations in the answer thereto." (p. 377.)

1 A.

The Circuit Court's refusal to construe the contract for the jury in the light of the law of England as shown by the evidence, and to instruct the jury as to the law of England as so shown, is contrary to all Federal decisions and to the opinions of the text writers.

The President of the insured company made the following admission concerning the execution of the contract:

> "Captain Dollar—This is a policy of insurance and was issued to us by the Maritime Insurance Company. I identify it particularly by the signature on the back. That is my signature (indicating).
>
> "Mr. Frank—You received that, did you, Mr. Dollar? That is the policy you received?
>
> "Ans. Yes, sir.
>
> "The Court—From whom?
>
> "Ans. We got it from our agents, Bowring & Co.
>
> "Q. Who by?
>
> "Ans. By Bowring & Co., our agents—our London agents.
>
> "The Court—Mr. Dollar, is this the only policy of insurance you have ever received evidencing the insurance of this ship?
>
> "Ans. That is the only policy, your Honor, and that policy never left our safe until after the ship had been seized, when I endorsed it on the back there, endorsed it and sent it to our London agents for collection (Rec. p. 136). * * *
>
> "Q. Was not this one of the last policies to be placed?
>
> "A. I don't recollect that. I was here and this was done in London" (p. 147).

As, in addition to the above evidence, the policy recites that it was signed in London by the London

agent of the company, it is apparent that in the absence of contrary evidence the jury was bound to find that the place of execution and of performance was in London. We will later show that there was no other relevant evidence introduced, and that this was the only conclusion which the jury could have reached. It is sufficient for the purposes of this chapter, however, that the execution in London *could* rationally have been inferred from the evidence.

It is elementary that the law of the place of delivery of an insurance policy controls its construction in the absence of a specific agreement that its performance, *i. e.*, the payment of the insured amount in case of loss, is to be made elsewhere. In this case there is no place of payment mentioned, and hence if the jury found, as it was entitled to do, that the policy was delivered to the insured's agent in London, the British law controls its interpretation.

Liverpool, etc., Co. v. *Phoenix Ins. Co.*, 129 U. S., 397;

Canton Ins. Co. v. *Woodbridge*, 90 Fed., 304.

At the trial the evidence showed the British law to be that the insurer, under a policy such as was pleaded, was not liable for a loss arising from the use of false papers to conceal the destination of her cargo. The analysis of this testimony is given in our next chapter.

We requested the Court to construe the contract for the jury in the light of the law as so shown. A number of instructions were offered for this purpose, which have been grouped under the first head, on page 4 of this brief. The following are the most general and the most specific of the requested instructions:

> " It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where on a voyage under a policy of insurance such as has been

proved in this case, a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a policy for such a loss." (p. 384.)

"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostok, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers, and it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss." (pp. 386, 387.)

Judge Van Fleet refused to give these instructions, not on the theory that they incorrectly expressed the British law, but because the construction of the laws controlling a contract executed in a foreign country (and hence its construction) was a matter of fact for the jury. This extraordinary doctrine is set forth in that portion of his instructions on p. 5 of this brief. In part, it is as follows:

"It is my province as the Judge of this court to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in its application to the issues presented in a case like this [*i. e.*, the construction of a written instrument], is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text-books by recognized authors of law-books on the subject, and that also is a high character of evidence tending to show what the law of a country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to a jury, but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result would be otherwise upon this controversy. Therefore it is essential that you determine that fact." (pp. 382, 383. Words in brackets inserted.)

The evidence thus left to the jury consisted of the deposition of the English barristers, John Andrew Hamilton, K. C., and Ralph Iliff Simey, editor of Arnould on Marine Insurance, who answered over 160 abstruse interrogatories concerning the law of marine insurance of Great Britain,

two English cases cited by the insurer, decided by the King's Bench in 1812, an English case cited by the insurer, decided by the King's Bench in 1757, and various other cases, ancient and modern, and text books.

There is no need to expand on the lower court's suggestion, that the determination of the question based on this evidence "is bound to be more or less blind to a jury." Common sense revolts at the absurdity of a court whose every function is concerned with the interpretation of the law, turning over to laymen the determination of an intricate question of the British law of marine insurance. A system of jurisprudence which thus wastes the trained capacity of its officers and leaves its litigants to the gambler's hazard (at best, in such a case) or the prejudices (more likely, in San Francisco at that time) of an uninstructed body of non-professional men, can not be expected to command the entire respect of the intelligent citizen.

We contend that such is not the law, and that the lower court in deciding that it was, has violated certain elementary principles, as well as ignored the ruling of the federal courts and the preponderating authority of the State courts and of the text writers.

The law is an exact science. The Court is not even permitted to indulge the theory that it can decide a question of law in two ways. If two decisions on the same point are opposed one is the law and the other is not. In other words the law is "one with itself." While the jury may find on disputed evidence that a certain statute has or has not been passed, or that a certain book does or does not contain the written decisions of a certain court, once these facts are decided, there is then no disputable question left to be submitted to them.

A contract obtains its obligatory sanction from the laws controlling and compelling its enforcement. A

court in construing a contract for a jury is simply telling the jury what the law is as applied to such an instrument. Here, in so far as concerns the defense that a contract does not create a liability under the English law, the Court must either have the power to construe it in the light of the English law, or it has no power to construe it at all. That it is the function of the Court to construe written instruments for the jury is elementary, and no federal decision has been cited denying the Court such a power.

1 Greenleaf, Evidence, §277.

Wigmore, Evidence, §2556.

However, even in cases of tort, where no question of construction of a contract is involved, the federal decisions hold that the Court should construe foreign laws not only when the statutes or decisions of foreign courts are before it, but where the opinions of foreign experts are offered in evidence.

In the case of *Mexican National Ry.* v. *Slater*, the suit arose from an injury in a railway accident in Mexico. The Circuit Court erroneously refused to accept the deposition of a Mexican lawyer, as to the state of the law of Mexico, as applied to the alleged tort of the railway. The Circuit Court of Appeals, commenting on the refusal, says:

> "The deposition of the witness having been offered to prove as a fact the law of a foreign country, was addressed to the judge to aid him in his rulings during the progress of the trial, and in giving his instructions to the jury; and if he erroneously refused to receive and consider it, it is still such proof of the foreign law offered in the trial court, that it can be taken judicial notice of on writ of error."

Mexican National Ry. v. *Slater*, 115 Fed., 593–608.

The Circuit Court of Appeals then proceeded to decide the case on the evidence of the foreign law, as shown in this deposition, *which had never reached the jury at all.* There is no escape from the effect of this decision; the Court must examine the evidence as to the foreign law, and tell the jury what the evidence shows that law to be.

It is to be noted that the language of the Circuit Court of Appeals is similar to that of the following quotation from Judge Story's Conflict of Laws:

> "But it may be asked whether they are to be *proved as* facts to the jury if the case is a trial at the common law, *or as facts to the Court. It would seem as facts to the latter;* for all matters of law are properly referable to the Court, and the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them."
>
> Story's Conflict of Laws, Sec. 638.

> "In regard to foreign laws, the established doctrine now is that no court takes judicial notice of the law of a foreign country. And the better opinion seems to be that this *proof must be made to the Court* rather than to the jury."
>
> Greenleaf, Evidence, Sec. 486.

The fact that the Court of Appeals had just cited Story in another point, shows conclusively that they agreed with him, and with Greenleaf as well, in this point also.

The only other federal case we have been able to find on the duty of the Court to instruct on foreign law is that of the Circuit Court of Pennsylvania, Justice Washington giving the opinion, in *Consequa* v. *Willings.* In this case the report shows the contention as follows:

> "Upon the first point it was *contended*, that the jury are alone competent to decide upon the credit

of witnesses, called to prove what is the law or usage of a foreign country; yet it belongs to the Court to decide, what is the law so proved, and in what manner it is to be construed; that it is the exclusive province of the *Court* to decide upon the weight of evidence, and the fact which is proved by it, if the witnesses called to prove it are believed by the jury; but in this case the whole was left to the jury."

Justice Washington says:

"The written or statute law of foreign countries are to be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parol evidence, and when proved, I admit that it is for the Court to construe them, and to decide upon their effect."

Consequa v. *Willings*, 1 Peters, C. C., 225; Fed. Cases, 3128.

As we shall show in our next chapter, the English law was *proved*. Under Justice Washington's decision Judge Van Fleet erred in refusing "to construe it and decide upon its effect."

That the view of the more profound text writers has not changed since the days of Greenleaf and Story, is apparent from the following:

"It is more generally held that a foreign law is a matter of 'fact,' *i. e.*, its existence is to be determined by the jury. *But the better view is that it should be proved to the judge*, who is decidedly the more appropriate person to determine it" (citing federal cases treated above).

Wigmore on Evidence, Par. 2558.

"*The weight of authority is that the evidence of a foreign law must be submitted to the Court rather than the jury.* But the courts of some jurisdictions hold

> that the jury should pass on the evidence. Even in these jurisdictions, however, the effect of the evidence, when entirely documentary, is for the Court."
> 13 American and English Encyc. Law (2d Ed.), 1071.

It is submitted that in refusing to construe the contract for the jury, grave error was committed, most prejudicial to the rights of defendant below.

1 A *continued.*

Under the law of England the insurer is not liable on a war risk policy for a condemnation for the use of false papers, unless express permission is given to carry them. Permission can not be implied even where condemnation and loss are certain without them.

The law of England was shown at the trial from the three decisions of the Court of King's Bench. Two of them, *Hornyer* v. *Lushington*, 15 East., 46, and *Oswell* v. *Vigne*, 15 East., 70, cited by defendants below, were decided in 1812, and one, *Pelly* v. *Assurance Company*, 1 Burroughs, 351, cited by plaintiff below, was decided by the same Court in 1757, some fifty-five years earlier. All three of these decisions are printed in full in the record at pages 276, 283 and 310, respectively.

The earlier decision had nothing to do with a war policy or with documentation. It was simply to the effect that underwriters are in general charged with a knowledge of the usual customs and practices of the voyage and trade in which the vessel is engaged. In that case it was the custom to store sails on shore in China, while on a round voyage to China and return. It was held that the insurance covered injury to the sails while so stored.

The two later cases both involve war risk insurance on voyages prohibited by the belligerents, and both raise the specific question of proper documentation. They hold squarely that even where the underwriter was charged with knowledge that unless false papers were used to conceal the prohibited portion of the voyage the vessels would be condemned on seizure by a belligerent, nevertheless, the policy does not cover a loss by capture for

carrying them unless there is an *express* permission given therefor. That is to say, the insured has no *implied right* to use false papers, even on a voyage where the use of the true papers would make condemnation inevitable.

In the case of *Hornyer* v. *Lushington* the insurance was for a voyage from Gottenberg, Sweden, to Riga, Russia. Sweden and Russia were then at war, and Russia had prohibited a voyage from a Swedish to a Russian port. It is apparent that the presentation of true papers to the Russian Government at the destination of the insured voyage would have caused the very loss insured against. No stronger case could be conceived for an implied permission to use false papers. The captain obtained papers purporting to show a voyage from Bergen, in Norway, a neutral port, to Riga. The vessel reached Riga, where the Russians discovered the true voyage, despite the deceit, and condemned the vessel.

Suit was brought, and the above facts shown.

> "It was then objected, on the part of the defendant, that the policy containing no leave to carry simulated papers, and the ship, notwithstanding, having carried them, and been condemned on that very ground, the plaintiff could not recover for a loss of which he himself had been the efficient cause. To which it was answered, that as the ship and cargo must necessarily have been confiscated if she had gone to Riga without simulated papers (Sweden being at war with Russia), the carrying of them was for the protection of the risk, and for the benefit of the insurer; and, therefore, *within the general scope of the policy*, though not within the particular words of it; in like manner as hoisting the enemy's flag, in sight of the enemy, in endeavoring to avoid capture is no fraud upon the underwriters" (pp. 278, 279).

A verdict was directed for the defendant which was sustained on appeal, Lord Ellenborough saying:

> "I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime; and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How, then, can the underwriter be answerable for a loss which happened from an act of the assured, done without his leave?" (p. 280.)

The other judges concurred with his lordship in this opinion.

If the carriage of false papers was not "within the general scope of the policy" on a voyage prohibited by the enemy, where the true papers would make condemnation certain, then assuredly it is not "within the general scope of the policy" on a voyage to a blockaded port prohibited by the enemy. There can be no ground of distinction between a voyage prohibited *from* an enemy's port and prohibited *to* an enemy's port. The implication of a right to use false papers is as reasonable for the one as for the other, and the law of England must be construed to refuse such an implication in either case.

The case of *Oswell* v. *Vigne* was on a war policy on a voyage from London to St. Petersburg. This voyage was prohibited by Denmark, and the captain endeavored to conceal it by a "simulated clearance," "false papers," and a false journal. A Danish privateer captured her and on proving the facts she was condemned. It was urged at the trial in the suit againt the insurance company that:

> "It was well known to all parties that the circumstances of her having touched in England was a cause of condemnation in the enemy's ports. But

> as every ship must carry some clearance, and the want of one would in itself have been a ground of condemnation; so a true clearance in the present case would have equally subjected her to condemnation, because it would have shown she came from England. By carrying simulated papers, therefore, the assured have done everything in their power to protect the underwriters, from the chance of a loss; who, if they had not so done, might more reasonably have objected that the assured had risked the safety of the ship by neglecting *that which is now a common precaution*. It would be unjust to hold that the carrying of simulated papers for the purpose of concealing a fact, which if known must necessarily have induced a condemnation, avoids the policy. The only object in carrying them was the protection of the ship. (Lord Ellenborough, C. J. Is it contended that the assured are authorized to do any act intended for the bona fide protection of the ship? Would, then, the assured have been at liberty to resist a right of search on account of her having these papers on board?)'' (p. 285.)

In the argument that follows the Attorney-General makes a very strong case for the implication of a right to carry false papers, but Lord Ellenborough (p. 289) again decides against the contention, the whole Court agreeing with him.

Grosse, *J.*, says:

> ''Though this is an ungracious defense, yet, looking to the sentence, I can not but say that the carrying of simulated papers was a ground of condemnation, and being so, the plaintiffs can not recover upon this policy in consequence of the loss from that cause.'' (p. 290.)

The remarks concerning the insurer's want to grace do not apply to this case. Here had his true papers been presented to the capturing cruiser, showing the voyage to

be to Vladivostok, the vessel could not have been condemned. The most the Japanese could have done would have been to detain the vessel and condemn the *cargo*, which was owned by Mr. Harry Hart, the charterer.

Testimony of Louis Hengstler, pp. 170–171;
The Rigende Jacobs, 1 C. Robinson, p. 91.

It should be noted also that while the false papers in the English cases describe a neutral voyage and tend to decrease the risk of condemnation, in our case they falsely describe a voyage to the port of the capturing belligerent, thus increasing the risk. The owners of the *M. S. Dollar*—whether negligently or otherwise is not in issue—courted capture when they cleared for a Japanese port.

The law of a foreign country once being shown to exist in a certain form is presumed to continue in that condition.

XIII. Am. & Eng. Encyc. Law, 1063;
Lux v. *Haggin*, 69 Cal., 255–381.

The law of England being thus proved by the reports of decisions of their tribunals, it became the duty of the lower court to instruct the jury as to its nature and application to the contract sued upon, even in those States where foreign law is ordinarily treated as a matter of fact for the jury.

> "The mortgage was not recorded, and no possession was taken under it for several months. It is a general rule that laws of other States must be proved as facts, and ordinarily, in a trial by jury, the question must be left to the jury to decide as a fact what the law of another State is, if it become material to be determined. *This may in some cases prove inconvenient in practice especially in view of our statute that the courts shall not charge juries with respect of matters of fact;* but such is the established rule in

this commonwealth. To this rule there is an exception where the evidence which is given of the *law of another State consists of a statute or judicial opinion or document. In such case the construction of such evidence is for the Court.*"

Ufford v. *Spaulding*, 30 N. E., 360; 156 Mass., 65.

"As the evidence as to the law of Illinois consisted entirely of the judicial opinions of that State, the question of their construction and effect was one for the Court alone."

Thompson Electric Co. v. *Palmer*, 15 N. W., 1137; 52 Minn., 174.

"It is also contended that the circuit judge erred in instructing the jury that the instruments in question were negotiable. The proofs offered to show the negotiable character of the notes consisted in the statutes and reports of Illinois. The cases offered in evidence (*Lauferty* v. *Johnson*, 17 Ill. App., 549, and *Jones* v. *Hubbard*, *Id.*, 564, and *Wolff* v. *Dorsey*, 38 Ill. App., at page 303, and a case of the same entitling in the same volume at page 305), we think fully establish that the note is, according to the law of Illinois, negotiable. See, also, *Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S., 268. 10 Sup. Ct., 999. *And, in view of the fact that the testimony was documentary, it was quite proper that the circuit judge should construe it, and instruct the jury as to its effect.* It was not contradicted, and there was no duty of weighing the evidence to be performed. Under such circumstances, where the facts are undisputed, it is proper for the court to state the effect of testimony to the jury."

Rice v. *Rankans*, 59 N. W., p. 661; 101 Mich., 386.

It is to be noted that, while these courts had no power to charge on the facts, this court has such power.

Vicksburg Ry. v. *Putnam*, 118 U. S., 545.

In addition to the presumption that the law has continued as it was shown to have been in 1812, we have the testimony of John Andrew Hamilton, K. C., and Ralph Iliff Simey. Concerning Mr. Hamilton's professional ability, the testimony is as follows: "There is no man who by knowledge and experience is better qualified to advise upon and deal with any question as to the English law of marine insurance" (p. 221). Aside from this, no student of modern English marine law can have failed to note that Mr. Hamilton's name appears as barrister in practically every case of importance shown in the reports.

Mr. Hamilton says unreservedly that under the law of England as it was at the time of the insurance and of the loss of the vessel, the company was not liable for a loss through the use of false papers, *under the policy as pleaded under the third amended complaint.* His reasons and citations of authority are given on pp. 250, 251, and the last paragraph of p. 259 of the Record.

Mr. Ralph Iliff Simey is well known to the profession in America, as the editor of Arnould on Marine Insurance, and is described in the evidence as follows: "Mr. Simey is a learned and experienced lawyer and one of the foremost living writers at the English Bar, on the English law of marine insurance" (p. 246). He agrees that as the law of England now is, the insurer is not liable for a loss arising from the use of false papers, where no express permission is given to carry them.

Deposition, Simey, pp. 226, 227, 228.

No expert testimony was offered to contradict the evidence of these two distinguished men. This could not be due to any want of confidence in that class of testimony, as Mr. Frank offered two experts to show the law and practice in another branch of the case.

Arnould, in his book on Marine Insurance, sustains our

contention with equal clarity. Mr. Hamilton describes this work as follows: "Arnould on Marine Insurance is the most authoritative English work on Marine Insurance."

> "Owing to the unexampled difficulties thrown in the way of English commerce during the great French wars, it became necessary to carry on trade with the Continent by the aid of simulated papers; yet our courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them.
>
> "Thus, where a British ship sailed from London for the Baltic and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held that, as the policy contained no liberty to carry such papers, the assured could not recover, although it was notorious that the trade sought to be protected by the policy could not be carried on without such papers, so that the fact of having them on board actually tended to diminish the risk; and the decision of the Court was the same where the fact of carrying such simulated papers appeared by the sentence to be at least one of the efficient causes of condemnation.
>
> "Of course, if the underwriters have agreed to the insertion on the face of the policy of a license to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground." (p. 298.)

Arnould himself used the language quoted in his second edition, and it has been repeated in the last.

Arnould, 2d Edition, pp. 733 and 734;
Arnould, 7th Edition, Sec. 732.

It is therefore submitted that under the law of England the insurer is not liable under the policy in this case, and that the court should have so construed it to the jury; that as the condition of the law appears from the decisions of the English courts, the circuit court should have instructed the jury, even under the rule of those state tribunals which treat foreign law as a matter of fact for the jury; and that even if the court had depended on the opinions of the experts, it should have construed the contract in the light of their testimony, as in the federal courts such evidence is addressed to the court, and not to the jury.

1 B.

The evidence of the witness Comyn concerning an agreement that the delivery of the policy was to be made in San Francisco, should have been stricken out, as the Maritime Insurance Company is not shown to be a party to that agreement. On the evidence the Court should not have instructed the jury that it could infer that he was the agent of both the insurer and the insured.

The policy sued upon was issued in consideration of the *persons effecting the policy promising to pay the premium* (Exhibit to 3d Amended Complaint, p. 83).

Captain Dollar testified that the policy was effected in London through the firm of Bowring & Co., and that Bowring & Co. were the Dollar Company's London agents.

The witness Comyn testified that he was manager of Bowring & Co., of San Francisco, which firm was in turn agent of the London corporation, C. T. Bowring & Co., Limited, a different firm. He says that the insurance was placed, not by his company, but by the other company in London (p. 161). He says that he did not know about anything that occurred in London, except by hearsay, "except that they placed the insurance and they sent us the policy."

The Court permitted Mr. Comyn to testify that in a conversation between himself, Mr. Dollar and Mr. Hart, it was agreed that

> "The policy was to be delivered to the Bank of California in San Francisco, and payment was to be

by the Bank of California in exchange for the policies" (p. 159).

On cross-examination, he testified that Mr. Hart acted on behalf of Mr. Dollar, president of the Dollar Company, and that he (Comyn) in turn procured the insurance, also acting on behalf of Mr. Dollar. He testified in part, as follows:

"Mr. Denman—Q. Do you know of your own knowledge whether any one ever said to the Maritime Insurance Company that that policy was to be delivered in San Francisco?

"A. No, I don't know of my own knowledge.

"Mr. Denman—Q. Do you know whether or not the Maritime Insurance Company ever heard that there was any arrangement that the premium was to be paid in San Francisco—of your own knowledge do you know that?

"A. I don't know anything as to what the Maritime heard, or not, because I was not in London. The arrangement was made by our people in London with the Maritime Insurance Company.

"The Court—Q. You know the premium was paid here?

"A. I know the premium was paid here. I collected the premium myself.

"Mr. Denman—Q. And you paid the premium over to your people in London, and they paid it to the Maritime; is that correct?

"A. That is correct as far as I know.

"Q. And the arrangement that was made was that you were to receive the premium here and forward it to your people in London, and they were to pay it to the Maritime Company there?

"A. There was no arrangement made here in regard to the payment to the Maritime, that I know of. We got the money when we gave the policies to the Bank of California.

"Q. To the Bank of California?

"A. Yes, sir. The Bank of California guaran-

teed to pay the money in exchange for the policies. It was a very big premium and we wanted to know where the money was going to come from.

"Mr. Denman—We move to strike out all the testimony of witness Comyn as to conversations or negotiations agreeing or looking to an agreement that the policy here sued on was to be delivered in San Francisco, on the ground that the same is irrelevant, incompetent and immaterial, and hearsay.

"The Court—The motion is denied.

"Mr. Denman—We note an exception."

(Record, pp. 164–5–6.)

It will be noted that there is not a word of testimony to show that any agent of the Maritime Insurance Company was present at any of these negotiations, or that any intimation concerning them was ever communicated to the Maritime Insurance Company. What undoubtedly occurred was that the Maritime Company, knowing nothing of the Dollar Company, insisted at the time of the delivery of the policy in London, that Bowring Company, Limited, should become personally liable on "the promise to pay the premium" contained in the policy. The latter company naturally refused to turn the policy over to its principal, the Dollar Company, until it had the money in hand to make good its promise.

Not only did the Court refuse to strike out the testimony, but it instructed the jury as follows:

"In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they have been disclosed to you what the fact was in that regard here."

We submit that the fact that Mr. Comyn, the admitted agent of the insurer, did collect the premium and did hand the policy to the Bank of California, is no evidence that he was then acting in behalf of the Maritime Insurance Company. It was his duty, as agent of Dollar, to hand the policy to his principal when it came into his possession. It was also his duty to his principal, Dollar, to forward to London the premium which was to discharge the promise to pay it made when the policy was delivered in London. The question was considered by the Circuit Court of Appeals in *United Firemen's Ins. Co.* v. *Thomas*, where it was held that the broker was the agent of the insured and not of the insurer at the moment of receipt of the policy, even though the Insurance Company paid him a part of the premium.

United Firemen's Ins. Co. v. *Thomas*, 92 Fed., 127, and cases cited.

While it is true that a man *may* be the agent of both parties to a contract, the law does not look kindly on such an arrangement, and in the absence of proof will presume that it did not exist. Here there is no evidence at all to show the duality of the agency.

St. Louis Co. v. *Edison Co.*, 64 Fed., 997;
Pegram v. *Ry. Co.*, 84 N. C., 696;
Atlee v. *Fink*, 75 Mo., 103;
United States v. *Boyd*, 5 Howard, 29 at 51;
City of Findley v. *Pertz*, C. C. A., 66 Fed., 432;
First Unitarian Society v. *Faulkner*, 91 U. S., 415.
Capener v. *Hagan*, 40 Ohio St., 203.
Mechem Ag., 67;
N. Y. Ins. Co. v. *Ins. Co.*, 14 N. Y., 85; 20 Barb., 468.

With such an instruction from the Court the jury was

most likely to infer that the Maritime Insurance Company did deliver its policy to the Dollar Company in San Francisco, and hence that the American law would control its interpretation. If the jury believed that the English law was in favor of the company, but that the American law was against it, and decided, under the instruction, that the policy was delivered by the Maritime Company in San Francisco, the instruction is directly responsible for the adverse verdict. The error is material, and a new trial should be granted.

2.

The error of the Court in misdescribing to the jury the evidence on the issue as to whether the vessel sailed on the insured voyage.

It is a condition precedent to recovery on any voyage policy of marine insurance, that the vessel shall have *sailed* on the voyage described. That is to say, have left the port of departure with the *intent* of sailing to the destination named in the policy. This intent is that of the captain, he being the organ of intelligence of the vessel's personality.

The burden of proof as to the performance of this condition precedent is of course on the plaintiff. The captain was put on the stand in the lower court, and testified in part as follows:

"Q. What was your destination?
"A. From San Francisco?
"Q. Yes.
"A. Moji or Vladivostock.
"Q. For which port were you actually sailing?
"A. I cleared for Moji.
"Q. Did you arrive at your destination?
"A. I did not.
"Q. Why not?
"A. I was stopped by the Japanese fleet.
"Q. At what place?
"A. Off Hakodate, in the straits of Pasouke.
"Q. On what day?
"A. 27th of January.
"Q. For what port were you making at the time you were stopped by the Japanese fleet?
"A. For Vladivostock.
"Q. When did you change your destination from Moji to Vladivostock?
"A. On the route."
(R. pp. 173, 174.)

The captain swore before the custom-house officials in San Francisco that the vessel was bound for Moji, and that the cargo was to be landed there (Rec. p. 217, 218, 219).

It is true that the captain later swore, at another time, that Vladivostok was his true destination, and that he was to call at Moji for coal. It appears, however, that Moji is four days' steaming from the route to Vladivostok (Rec. pp. 147 and 292); and it would hardly be likely that he would coal at Moji when carrying contraband to Vladivostok; that is, unless they really wanted to have the vessel condemned.

With the evidence in this condition, it became a matter for the jury to decide whether the burden of proof that the captain intended at his departure to sail to Vladivostok, has been sustained. There was evidence enough to uphold the jury's verdict whether they found he was then bound to the Japanese or the Russian port.

The Circuit Court gave the following instructions:

> "The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance the real destination of the vessel was Vladivostok (p. 379).

This instruction does not state the truth. The captain, who was one of the plaintiff's witnesses, had testified that his intent was to go to Moji and there land his cargo, and that he changed his destination en route. True, he also contradicted this by stating substantially what the court's instruction contained. While the Circuit Court can instruct the jury on the facts, it can not with propriety cull from the contradictory testimony one-half of the evidence and say nothing of the other half.

Not only does the Court fail to describe fairly the testimony as to the captain's intent, but it grossly misdescribes

the testimony as to the insurer's intent, or, rather, miscreates testimony that nowhere exists. Of course, if the Maritime Insurance Company intended to insure a voyage to Vladivostok although the clearance was for Moji, then the actions of the captain might well be construed as entirely proper as carrying out the Insurance Company's intent. The jury might well say, in the absence of any testimony regarding the intent of the insurer, that the captain's contradictory statements concerning the two destinations did not sustain the burden of proof. On the other hand, if there were testimony that the Insurance Company also contemplated such duplicity, the captain's actions would be explained and the burden of proof regarded as sustained.

Now there is not a line of evidence as to any intent of the defendant, the Maritime Insurance Company, to have the *M. S. Dollar* clear for Moji, a port of the opposing belligerent, four days' steaming from the route to the destination of the insured voyage. Nevertheless, the Court gave the following instruction:

> "The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the real destination of the vessel was Vladivostok, and the real purpose and intention of *defendant* was that she should go to Vladivostok notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that under the law of England, where the real destination is a port for which the vessel is insured, which in this case is Vladivostok, the clearance for Moji does not constitute an abandonment of or a failure to sail upon the insured voyage."

This instruction practically took from the jury the company's defense, that the vessel sailed on a different voyage from that insured. Under the evidence, it was a question for the jury, and the error in deciding it for them was substantial.

3.

The Court should have instructed the jury that if the supplying and use of false papers to Moji, Japan, the port of a belligerent, instead of to a neutral port, tended to increase the risk and caused the condemnation, the insurer was not liable. It erred in taking judicial notice of a custom to carry any false papers whether prejudicial or helpful.

There is no evidence of any custom established in the trade to Vladivostok during the Russo-Japanese war to carry any false papers, much less to carry false papers made out to one of the two belligerents. The only evidence on the subject is that it became a custom in some other wars to carry papers showing a *neutral* destination. (Testimony Hengstler, pp. 170, 171; Admiral Kempf, p. 166.) It also has been shown to be the law that if no attempt at concealment had been made the Japanese could not have condemned the ship (p. 25, *supra*).

It is apparent that it can not be a recognized custom that *any* false papers can be carried simply because they are false. For instance, could it be urged that the insurer would be liable if the vessel was condemned for carrying and using papers falsely describing a cargo of corn as being destined for the Russian army and hence obviously contraband, when in fact it was destined for private consumption? It is hard to suppose such a case, but it is parallel to taking papers out for Moji, Japan, when the cargo was destined for a Russian port, at once suggesting

to the Japanese to see if any such goods were ordered from Moji,* and exposing the goods to a Russian capture.

The custom shown must be reasonable or it will not be recognized by the court.

Taylor v. *Carpenter*, 23 Fed. Cases, 13,785;
Haskins v. *Warren*, 115 Mass., 514;
12 Cyc., 1048, and cases.

The Court, however, fell into just this error, and instructed the jury that it would take *judicial notice* of the custom of carrying false papers without making any distinction between those papers which might reasonably assist in evading condemnation, and those which would necessarily increase the risk of it. This error is the more glaring, as the distinction was specifically relied upon in our answer (R., p. 348).

It was our contention that the Court should have held that no custom to carry the Moji papers had been shown, and should have instructed the jury as follows:

> "A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of the other belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury can not regard the underwriters as charged with notice of it." (p. 390.)

But even admitting that the use of the Moji papers was not conclusively improper, the question was still one that should not have been taken from the jury on any theory that the Court could take judicial notice that any false papers were proper.

The question as to the use of false papers came before

*That the Moji clearance did in fact put the Japanese on their guard is apparent from the statement of the captain of the capturing cruiser, who told Captain Cross that he had been on the lookout for the *Dollar* for some time (Record, p. 175).

the United States Supreme Court in the case of *Livingstone* v. *Maryland Ins. Co.*, where the Court through Chief Justice Marshall holds that it is a question for the jury, as to whether they are authorized by the usage and custom of the trade, and whether they increase the risk of capture.

> *Livingstone* v. *Maryland Ins. Co.*, 7 Cranch, 506, at 546 and 547 (considering 8th exception).

The Court refused to give the following instructions:

> "If you find that the act of falsely clearing for Moji, Japan, tended to increase the risk of capture, seizure and detention, and if you find that that act contributed to the loss claimed, you must find for the defendant." (p. 390.)

> "No custom has been shown in this case for a vessel to carry papers falsely showing the destination to be the port of one belligerent when in fact bound for the port of the other belligerent." (p. 362.)

Not only do these refusals violate the principle laid down by Chief Justice Marshall, but also that elementary principle of insurance law that the insurer is not liable for losses occasioned by the insured's own neglect.

We submit that the Court commits these prejudicial errors: (1) in taking judicial notice that *any* false papers are carried pursuant to a custom established in *all* wars, regardless of the nature of their falsity; (2) in not treating the Moji papers as so unreasonable as to be unauthorized by any custom; (3) in not leaving to the jury the question whether the papers tended to increase the risk and did, in fact, cause the condemnation. A reversal would seem warranted for any of these errors.

4.

The Court should have directed a verdict for the defendant below, as the plaintiff failed to prove any damages or any insured interest at the time of the loss. The interest of the insured, being merely in the profits of the ship, if any, for a period and consideration not shown, the hull valuation in the policy is not the measure of the insured's injury.

The interest of the insured must exist at the time of the receipt of the policy and the time of the loss.

9 Cyc., 584, and cases cited.

The answer raised the issue as to the insured's interest at the time of the loss, *i. e.*, early in the year 1905 (pp. 96, 97, 98).

The president of the insured described the interest at the *time of the issuance of the policy* on December 24, 1904, as that of a right to take the profits of the vessel for a period and consideration not shown. It appears that the vessel was bought back from the Japanese at her condemnation sale, in the spring of 1905, and *at the time of the trial* the equitable ownership, according to Mr. Dollar's opinion, was in the San Francisco corporation, while the legal title was in the British Columbia corporation. The testimony on this point is as follows:

> "Mr. Dollar—(Continuing). At the time of the issuance of this policy of insurance, the steamship was operated by the San Francisco corporation, who took the profits, stood the expense, made all the contracts in the name of the M. S. Dollar Steamship Company, and operated her as owner under an arrangement whereby all the profits were to go to the

California corporation, and the California corporation was to take entire management and control of the ship and the business."
(R., p. 135.)

Captain Cross—"A. She was as far as I know kept by the Japanese Government and we bought her back again.
"Q. You do not know of your own knowledge, do you?
"A. We bought her back.
"Q. You do not know it of your own knowledge, you did not buy her back yourself?
"A. I did not buy her back myself, but I know Mr. Dollar did.
"Q. Who told you that he did?
"A. I saw him there buying her.
"Q. Where was this?
"A. In Yokohama."
(R., p. 180, 181.)

"Mr. Dollar—The owner of that ship **is** the California corporation, and the company in British Columbia simply **is** the holding company, and they **have** no interest in it whatever. The legal title **is** in the British corporation; the real title, the real owner **is** a San Francisco corporation; the people who put up the money are San Francisco people."
(R., p. 143.)

It is submitted that the evidence of the interest of the insured in December, 1904, or in the spring of 1905, *some weeks after the condemnation*, when the vessel was repurchased, or more than four years after the loss, when Captain Dollar was on the witness stand, is no evidence at all of the interest at the *time* of the loss.

The burden of proof is on the insured to show his interest at that moment. For all the record shows, the ownership of the vessel was so shifted between the Arab Company, the Dollar Company, Limited, and the M. S.

Dollar Steamship Company, that each of these mysterious corporations could have collected full insurance for her loss. To believe this would require no more stretch of the imagination than to believe the captain's story, that while carrying contraband to Vladivostok he intended to coal at Moji, the port of the enemy, four days' steaming off his course, and *therefore* took false papers to the latter destination.

As the burden of proof was not upon us, we did not open up that portion of the case, but the strange and unexplained shiftings of ownership, the oath of the president that she was at the time of the insurance owned by the Arab Steamship Company (Rec. p. 45), his later contradiction of this (p. 79), and the stranger character of the false papers, are, to say the least, suggestive.

It may be urged that the interest shown at the time of the issuance of the policy is presumed to continue to the loss of the vessel. We know of no such presumption, and believe that the proof must be made for each occasion. However, even if this be the law, the situation is not improved. The interest at that time was an "arrangement" for the right to take the vessel's profits. There is no evidence to show what the consideration for the arrangement was, or how long it was to continue. There is no evidence that there were any profits, much less that they amounted to over seventeen thousand dollars, the sum found by the jury.

The agreed valuation is merely that of the hull of the vessel, which at this time belonged to the British Columbia corporation. There is no evidence as to her availability for sea-service, and if she had become obsolete and been sold for junk the proceeds would not belong to the California corporation. The hull may have had one hundred and seventy thousand dollars' worth of such material in her and yet she be useless for any ordinary

commercial service on the Pacific, and not capable of earning a cent of profit. An agreement as to the value of the hull certainly can not be the criterion of the value of the profits insured.

We submit that the refusing to direct a verdict for the defendant because of plaintiff's failure to sustain its burden of proof of an insurable interest at the time of the loss, and the amount of damages by the loss, was a denial of a substantial right, and that a new trial should be granted.

In conclusion we urge that we have established each of the points under which our assignments of error have been grouped; and that in each the error was substantial, warranting a new trial.

William Denman,
Attorney for Maritime Insurance Company,
Plaintiff in Error.

No. 1753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE MARITIME INSURANCE COMPANY, LIMITED (a corporation),

Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Attorney for Defendant in Error.

FRANK & MANSFIELD,
Of Counsel.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

In December 1904 the M. S. Dollar Steamship Company caused the steamer "M. S. Dollar" to be insured for the sum of 37,000 pounds sterling with some 150 different English insurers (Record, p. 147), against war risks on a voyage from San Francisco to Vladivostock, at a premium of *25 per cent.* The vessel was seized on said voyage by a Japanese man-of-war. All the said insurers paid their proportion of said loss, the Maritime Insurance Company, defendant herein, alone excepted.

Its policy called for 3,000 pounds sterling, for the recovery of which sum this suit is brought.

The policy described the risk insured as "those risks " excluded by the Warranted free from capture, seizure " and detention clause in Marine Policy or Policies" and covered for a voyage from the port of San Francisco to Vladivostock, while there, and thence back to a safe neutral port.

Vladivostock was at that time the principal naval station and base of supplies for Russia, at the seat of war, and was being closely invested by the Japanese. The port was, in fact, under blockade. (p. 202.)

The policy contained an express provision giving the assured the "liberty to run blockade." This provision must be borne in mind, because it is a peculiarly distinguishing feature of this policy, and will serve to solve some questions to which appellant seems to attach importance.

The insurance was effected through the agency of Bowring & Co., insurance brokers, who were doing business in London, England, and in San Francisco. The negotiations between the assured and Bowring & Co. were had with one Comyn, Pacific Coast manager of said Bowring & Co. Between him and the assured it was agreed, as a condition precedent to the delivery of the policies, that the premiums should be prepaid at San Francisco simultaneously with such delivery. Arrangements were accordingly made with the Bank of California at San Francisco for the payment by it of the premi-

ums to said Pacific Coast agent of said Bowring & Co. upon receipt of the policy.

In pursuance of this agreement, the Pacific Coast manager of said Bowring & Co. forwarded the application to C. T. Bowring & Co. Limited at London, who, in turn, having procured the policy in London, forwarded it to Comyn, their Pacific Coast agent. By him the policy was delivered to the Bank of California at San Francisco, on payment of the premiums. Said premiums were then forwarded by said Comyn to said C. T. Bowring & Co., Ltd., at London.

Before the departure of the vessel, the master was directed by his managing owner to proceed to Vladivostock via La Perouse straits, if they were not blockaded with ice, and if they were frozen up, then to go through the Straits of Tsugar and through the Sea of Japan, (Record, p. 147), and he left San Francisco with the intention of going through said La Perouse straits. (Record, p. 185.) Those straits lie between the northermost island of the Japanese group and the Kuril Islands; Tsugar straits are somewhat further south, lying between the Islands of Yeddo and the main island of the Japanese group.

At the same time, and in order to avoid capture by the Japanese fleet, a false clearance was taken for Moji, Japan, which, though not the real destination of said vessel, was a coaling port at which it might become necessary to stop.

The voyage was pursued with these and other false or simulated papers on board as a precaution against capture in case of being overhauled by Japanese cruisers.

The vessel having arrived off the La Perouse straits, was unable to get through by reason of ice. It therefore became necessary to attempt the Straits of Tsugar.

On the 26th day of January, 1905, (pp. 78 & 104), after having passed through the Tsugar straits in the night time, she was discovered, in the Japanese Sea, by the searchlight of a Japanese man-of-war, overhauled, and taken into custody.

The captain exhibited to his captors, his clearance papers for Moji and other simulated papers, but to no avail because the Japanese had been previously advised of the nature of her voyage, and had been lying in wait for her. The officers of the man-of-war advised the captain that the port of Vladivostock was blockaded by the Japanese fleet, (p. 202), and took the "M. S. Dollar," and cargo, to the Japanese Naval Station, where she was finally condemned and sold as a prize of war.

Immediately upon the arrival of news of the seizure, to wit: on February 1st, 1905, and before the trial and condemnation, the assured abandoned to the insurance company. This the pleadings admit. (p. 80).

Thereafter the said company demanded certain proofs of loss, to wit: the master's protest, and the decree of condemnation, both of which were duly furnished. (p. 141.)

Ostensibly there are seven defenses set up in the answer. All of them, however, for the practical purposes of the case, resolve themselves into the following proposition: that the contract in question was an English contract; that, under English law, in case of capture,

seizure or detention and condemnation for the carriage of false or simulated papers, unless express leave be given the insured to carry such papers, the underwriter would be relieved from liability; that the judgment or decree of the prize tribunal condemning the vessel for carrying such papers, is exclusive evidence of the grounds of such condemnation; that the said vessel was condemned by the Japanese Prize Court for carrying false papers, and that no permission was given by defendant to plaintiff to carry the same.

The case was submitted to the jury who found for plaintiff. All disputed questions of fact must therefore be treated as found for the plaintiff, and it only remains to ascertain whether or no there was any substantial error in the manner of so submitting it.

In that connection the most prominent, and perhaps the only real questions, involved in the assignment of errors, are, (1) the admissibility of the testimony of Comyn relative to the condition precedent to the delivery of the policy, as hereinbefore related, and, (2) whether or not the court erred in the mode of instructing the jury with respect to foreign law.

Before entering upon the discussion of the alleged errors in the trial, it will be noted that the record shows a number of *exceptions taken* in the course of the trial *which are not assigned as error* in the assignment of errors. It will further be noted that there are *some alleged assignments of error for which there is no foundation in the record.*

In the discussion which follows, therefore, we shall consider only those alleged errors which are properly assigned.

I.

THE FOREIGN LAW AND THE INSTRUCTIONS OF THE COURT RELATING THERETO.

The assignments of error upon this subject point to the refusal of the court to give instructions requested by defendant which were, in effect, instructions to the jury to bring in a verdict for the defendant. They may be summarized in the proposition that, under the law of England as applied to the facts of this case, the defendant is not liable.

It will be gathered from the instructions, as given, that the court disagreed with the defendant as to what the law of England was respecting the use of simulated papers, and as to what the facts in the case were with respect to abandonment of voyage and other subsidiary questions. He also expressed himself as disagreeing with the defendant with respect to the mode of submitting the questions of foreign law to the jury.

Before taking up in detail the instructions given and refused, and the manner of the submission of the questions to the jury, it will be well to consider what the evidence in this case is respecting the law of England upon the subject.

In this discussion we hold in reserve the effect of the evidence of the witness Comyn upon the question of the *lex loci contractus*.

The purpose of this inquiry is to determine whether or no

(a) *The verdict of the jury made a proper application of the law of England to the facts of the case?*

If it did, it is immaterial how the question was submitted to them—whether the court should have instructed the jury upon the foreign law as matter of law, or whether he should have submitted it as matter of fact pure and simple—for, if the method of submitting it was erroneous, yet, if the jury decide the question of law aright, the verdict cures the error, and it is harmless. That has been definitively settled by the Supreme Court of the United States:

"The submission of the question of law to the jury is no ground of exception if they decide it aright."

Indianapolis, Etc. R. R. Co. v. Col. Rolling M. Co., 119 U. S. 149;

Pence v. Langdon, 99 U. S. 578.

To the same effect in the State courts we find

Bernstein v. Humes, 78 Ala. 134;

Consol. Coal Co. v. Shafer, 135 Ill. 210;

Hines v. Cottle, 143 Mass. 310;

Johnson v. Shively, 9 Or. 333.

(b) In the second place, if the law of England relating to the use of simulated papers, as applied to this policy, is as we contend it is, that is, the same as the American law upon the subject,—*then the evidence of Comyn, if erroneously admitted, becomes immaterial and harmless, because it tends only to subject the facts to the same law and hence to the same conclusion or judgment.*

In order, therefore, to ascertain if the jury did decide the law aright, we address ourselves to the

1. Evidence of the law of England relating to the use of simulated papers as applied to this policy and loss.

Much reliance is placed by appellant upon the testimony of two English lawyers, Simey and Hamilton. At the outset it will be observed that their testimony is based upon hypothetical interrogatories that make no reference to the blockade of the port of Vladivostock, and attendant facts, developed at the trial. (Simey, answer to the 23rd Interrogatory, p. 226; Interrogatories 23, 24, 25, 26, 27 & 28, pp. 226, 227, 228; Interrogatories addressed to John Andrew Hamilton, 33, 34, 35, 36, 37 and 38, pp. 250, 251, 252.)

It appears from their testimony that

"There is no authority for the proposition that the carriage of false papers avoids the policy in toto. It is not 'a breach of warranty' in a technical sense." (pp. 222-223.)

Hamilton says, (p. 259): "It is not a warranty in the technical sense, but the loss cannot be recovered against the underwriters, as it is directly due to the assured's own acts, *and is not within the indemnity contained in the policy.*" (p. 259.)

That is the whole question to be determined. Is such a loss within the indemnity contained in this policy?

To determine this question, the nature of the voyage insured is material. But the facts representing the nature of the voyage are nowhere included in the hypothetical questions upon which the answers of those gen-

tlemen are based. It is true that they are asked what their answers would be in the event it was also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers, and that it was the custom of such trade to carry such papers. It is also true that a copy of the policy is contained in the interrogatories; but their attention is nowhere called to the fact that the policy in question expressly insured the vessel for a voyage to a blockaded port, with *express permission to run the blockade.* It is fairly to be assumed, that if their attention had been called to such fact, their testimony would have been modified in accordance with that rule of the English law, of which there is uncontroverted proof, that "what is usu- " ally done by such a ship, on such a cargo, in such a " voyage, is understood to be referred to in every policy " and made a part of it as much as if it was expressed." (p. 297.)

We make this suggestion with much confidence, because of the well recognized imperfection of the mode of taking testimony by interrogatories, instead of oral examination, which latter mode alone permits the examiner to follow and fully develop the answers of the witness by questions based on what his previous answers disclose is resting in his mind.

However, be this as it may.

The testimony of the two lawyers in question can be of no greater value than are the decisions upon which it is based.

The law of England, respecting the matter, is not statutory, nor is it otherwise peculiar so as to acquire a local color or require construction and interpretation by local counsel. It is *the common law of England,* and the authorities, upon which those gentlemen rely, are two decisions of Lord Ellenborough rendered within *three days* of each other, and so short a time after the Declaration of Independence (Jan. 28 & Jan. 31 1812) as to make it certain that the English common law had then suffered no change since such Declaration of Independence. But that English common law is *our own common law.* Moreover, as suggested by Lord Mansfield (Rec. p. 313), in speaking of the contract of insurance,

"The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same."

The evidence also discloses that there are *no* English decisions, upon the precise question decided in those two cases, *since that date.* (Hamilton, pp. 259-260; Cross Interrogatory 34.)

This court is, therefore, as well able to draw a correct conclusion *from the decisions,* as to what the law of England upon the subject under consideration was at that time, as were the two lawyers in question.

The citation from Arnould on Insurance is subject to the same limitations. It also is based alone upon the two decisions in question, and on the particular facts of those two cases.

These decisions of Lord Ellenborough stand alone with no confirmation by any other judge or court, and we feel confident that they do not to-day express the common law of that country, as we shall presently show. In this connection it is significant that, with the enormous losses suffered by insurers on war risks in the Russo-Japanese War, where simulated papers was the common practice, and with the large number of co-insurers on this same ship, Simey and Hamilton cannot point to a single other case upon the question, submitted to English courts for adjudication. This, though negative, is strong evidence that the authority of the two cases in question is to-day not recognized by the British bar.

However, whatever may be said of those cases *as applied to their particular facts,* we propose to show, from the evidence, that the conclusion of those two lawyers with respect to the application of the English law *to the facts of this case,* is erroneous.

As said by one of the judges in Oswell v. Vigne, "This is an ungracious defense." (Record, p. 290.) It is unjust and illogical. As said by Lord Mansfield, "It is absurd to suppose, when the end is insured, that "the usual means of attaining it are meant to be ex-"cluded." (Record, p. 313.) "It is certain, that, in "the construction of policies, the *strictum jus,* or *apex* "*juris,* is not to be laid hold on, but they are *to be con-*"*strued largely for the benefit of trade and for the* "*insured.*" (Record, p. 313.)

Under these circumstances, giving full effect to Messrs. Simey and Hamilton's testimony that they are

"decisions never overruled or questioned in any decided case, and therefore binding authorities as the law at present stands", (Record, pp. 259, 260), *no court would presume to extend that authority beyond the precise facts presented therein.*

Let us first consider HORNEYER v. LUSHINGTON, (Rec. 276-283). The decision in this case upon the question now under consideration, is contained in the following language, (p. 280):

"I do not pronounce whether the carrying of false papers was or was not an enhancement of the risk insured; but my opinion is founded on the fact of the sentence of condemnation which has proceeded upon the mere personal act of the assured in carrying such papers, *which it treats as a crime,* and which act is thereby proved to have been the effective cause of the loss, the very ground of the condemnation. How, then, can the underwriter be answerable for a loss which happened from an act of the assured *done without his leave"?*

The policy "did not contain any liberty to carry sim-" ulated papers" (p. 277), though it was a voyage " at and from Gottenburg to Riga, or any port in the " Baltic." Gottenburg is in Sweden and Riga in Russia, and Sweden and Russia were at war. The vessel was seized and condemned by the Russians. "The in-" surer insured the risk *generally without any stipula-" tion".* (p. 280).

In this respect the case differs from the one at bar, because our insurance is not a general insurance without any stipulation, but contains an express provision that we should have liberty to run the blockade.

So, though the court in that case held that the simulated papers were carried "without the underwriters' leave" it cannot be said that here where the assured is given express leave to run the blockade, the carrying of simulated papers, which is a part and parcel of blockade running, was not included within that leave.

The other case,—

Oswell v. Vigne, seems to have followed the former. The policy covered "at and from London to any port " or ports in the Baltic", and "did not contain any " leave to carry simulated papers". (p. 283). She was bound to Petersburg and was captured by a Danish privateer, and the decision, so far as that question is concerned, is found in the words:

"The question, then, is, if the carrying of them was one of the causes of her condemnation: if it were, it was a risk to which the underwriter has been exposed *without his consent.*" (p. 289).

Now, we have called attention to the fact that the insurance in the present case was for a voyage "at and " from San Francisco to Vladivostock, while there, and " *thence back* to a *safe neutral port* * * * with " liberty to run blockade", and Vladivostock was the Russian Naval base and in a state of blockade.

The terms of this policy are certainly different from the terms of either of the policies in the cases above mentioned, and the question is, whether or not this liberty to run blockade carried with it, by necessary implication, the liberty to carry false papers. If so, the act of the assured in so doing could not be said to have

exposed the vessel to a "risk to which the underwriter " had been exposed *without his consent.*"

The language of the text writers has enlarged somewhat upon the decision in those two cases, for we find on page 298 a quotation from ARNOULD, Sec. 732, relying upon the authority of those two cases, wherein the proposition is stated that the underwriter is discharged from liability where a condemnation proceeds upon the ground of carrying simulated papers, "except where " there was an *express* leave given in the policy to " carry them", and again in the same section, citing OSWELL v. VIGNE, "Of course, if the underwriters have agreed to the *insertion on the face of the policy of a license* to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground."

We do not find anything in the decisions stating that *express* leave must be given in a policy to carry simulated papers, nor anything in the reason for the decisions that would relieve such a case from the rule most emphatically declared by the same text writer that

"Every policy of insurance impliedly contains within itself certain terms and conditions which, though not on the face of the instrument, are of the same binding authority as though they were, and combine with the express clauses to make up the whole of the contract between the assured and the underwriters.

"They are, in fact, *the terms upon which the parties mutually understand their contract to be based;* and are regarded as so much a matter of course, that it would be needless ceremony to express them in form."

ARNOULD ON INS., Sec. 30. (Record p. 294.)

Enumerating those implied agreements in the same section, that author says:

"5. Not only the course of the voyage insured, but all generally established usages of trade and navigation, applicable to the subject of their contract, are always supposed to be known by the parties contracting for a mercantile indemnity; and therefore, though never expressly inserted in any policy, *are as binding on the parties as though they were.*" (Record, p. 296.)

Again, Section 57 of the same work, (Record p. 297), speaking of and quoting from Lord Mansfield:

"The description of the voyage in the policy, he says, in another case, 'is an *express reference* to the usual manner of making it, as much as if every circumstance were mentioned' on the face of the instrument. 'What is usually done by such a ship, on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it *as much as if it was expressed.*'"

This quotation is from the opinion of Lord Mansfield in the case of

Pelly v. Royal Ex. Ins. Co., 1 Burroughs, 341,

and found in this record on pages 310 to 320, inclusive. In that case the vessel was insured for a voyage "at " and from London to any ports and places beyond the " Cape of Good Hope and back to London." She proceeded to Canton, in China, where she was to stay, to clean and refit, and for other purposes. Upon her arrival there, certain of her tackle and furniture was stored in a warehouse, called Bank-saul, in order to be there repaired, and kept dry and preserved until the ship should be refitted, and while there this tackle was

destroyed by fire. This practice of so storing her outfit, was in accordance with the well-known usage of European ships, except Dutch ships, going to China on voyages. Speaking of the policy of insurance, Lord Mansfield said:

"From the nature, object and utility of this kind of contract consequences have been drawn, and a system of construction established upon the ancient and inaccurate form of words in which the instrument is conceived.

"*The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.*

"Hence, among many others, the following rules have been settled:

* * * * * * * * * * *

"The insurer, *in estimating the price* at which he is willing to indemnify the trader against all risks, must have under his consideration *the nature of the voyage* to be performed and *the usual course and manner of doing it.* Everything done in the usual course must have been foreseen, and in contemplation, at the time he engaged. He took the risk upon a supposition that what was usual *or necessary* would be done.

It is absurd to suppose, when the end is insured, that the usual means of attaining it are meant to be excluded."

We might digress here to call attention to the fact that the above statement of Lord Mansfield as to what the insurer has under his consideration, is linked with the act of the insurer *in estimating the price at which he is willing to indemnify the trader.* In the present instance that price was the extraordinary sum of *twenty-five per cent.* This would seem to indicate that something more than an ordinary commercial risk had been contemplated by the parties. Appellant contends that without false papers the ship, in the present case, would

have run no risk at all of condemnation. The inquiry naturally arises, why does the insurer demand such an enormous premium, if that risk were not insured against?

Proceeding, Lord Mansfield refers to the case of

TIERNEY v. ETHERINGTON as a case where all this has been determined, and in that case the policy contained an agreement that "The goods might be unloaded and "reshipped in one or more British ship or ships." They were, however, loaded into a store ship or warehouse, there being no British ship there, and the insurer contended that the liberty to unload did not extend to the store ship. The court there said, however:

"We have liberty to unload and reship, *and therefore have liberty to use all means in order to do that.*

* * * * * * * * * * *

As here is a liberty given of unloading and reshipping, it must be taken to be an insuring the goods under such methods as are proper for the unloading and reshipping."

Accordingly, Lord Mansfield held that in the case before him the same reasoning would hold, concluding:

"And in general, what is usually done by such a ship, on such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it was expressed." (Record, pp. 315, 316, 317.)

A direct application of that decision to an alleged concealment of belligerent ownership by false letters is made for us by the Supreme Court of the United States in

BUCK v. CHESAPEAKE INSURANCE CO., 1 Pet. 161, and

found in the present record on pages 320, 321, 322, where the Court said:

"A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract; must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in Pelly vs. Royal Exchange, etc., 1 Burr., 341, 'the insurer, at the time of underwriting has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy.' Hence, when a neutral carrying on a trade from a belligerent to a neutral country asks for insurance 'for whom it may concern', it is an awakening circumstance. *No underwriter can be ignorant of the practice of neutrals to cover belligerent property,* under neutral names, *or of the precautions ordinarily resorted to,* that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary, than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters thus intercepted, have often been the ground-work of condemnation in admiralty courts; and underwriters, to whom the extension of trade is always beneficial, *must and do connive at the practice, in silence. They ask no questions, propose their premiums, and the contract is as well understood, as the most thorough explanation can make it.*"

This opinion was introduced in evidence without objection. It illustrates the application of the rule in Pelly v. Royal Exchange (an English decision) to the question here at issue. That opinion of our own Supreme Court is, therefore, in effect, that the decisions of Horneyer v. Lushington and Oswell v. Vigne, over-

looked the rule in the Pelly case, and hence are not a true expression of the common law of England upon that subject. May we not receive that opinion as a safer exposition of the law, than the opinion of private practitioners whose judgment may even unconsciously be biased by the fact that they "expect to receive pro-" fessional remuneration in connection with my answer " to all these questions"? (Record, p. 229.)

The error of Mr. Simey and Mr. Hamilton in their opinion of the law of England with respect to this case, is further exemplified by their own evidence. In answer to the 23rd interrogatory (Record, pp. 226-227), Mr. Simey gives 1 DUER ON INSURANCE, p. 744 as one of the authorities upon which he relies for the opinion so expressed by him. That work thus becomes part of the evidence of the English law upon this subject. But that authority does not support appellant's contention, but on the contrary fully supports our view of that law, which view Duer fortifies with other *English* as well as American authorities. (See Record, pp. 306, 307, 308, 309 & 310.) Duer limits the rule which releases the insurer in the case of condemnation for the use of false or simulated papers to cases "where no permission to " use such papers is given by the insurer, *or his consent* " *to assume the risk, from the known usage of the trade* " *or other circumstances cannot be implied*". (Record, p. 306.)

Speaking of OSWELL v. VIGNE and HORNEYER v. LUSHINGTON, that author further says, (Record, p. 307):

"Section 48. The language of the Court of King's Bench, in some of the reported cases, seems to imply,

that the leave to carry simulated papers, must be given, by an express provision in the policy, and that a mere disclosure to the insurer, of the intention to use them, would not be sufficient to charge him with the risk. It is, however, certain, *from other cases in the English Courts* and from numerous decisions in the United States, that where the carrying of false papers, in the voyage or trade to which the insurance relates, is a known or general usage, *or* where the use of such papers, *from the very nature of the voyage is indispensible,* the law will impute to the insurer the knowledge of the fact and imply his consent to assume the risk; and it appears to be a necessary inference from these decisions, that the insurer must be equally liable, where his knowledge of the fact is proved by evidence of a direct representation prior to the insurance. Where he subscribes the policy, with a knowledge of the facts, his consent to assume the risk, may be as justly implied in the one case, as in the other.

"In Planche v. Fletcher (Doug. 283), the true destination of the ship was concealed by a false clearance, and it was insisted, that the omission to disclose this fact, was a fraud upon the underwriters; but Lord Mansfield said, 'there was no fraud on them or on anybody, since what had been practiced had been proved to be the constant course of the trade, and notoriously so to everybody.' From this usage, therefore, the underwriter's knowledge of the fact, and his consent to assume the risk, *were inferred.*"

By this reference to PLANCHE v. FLETCHER we are advised that there is at least one other English case on the subject, and that it does not agree with the cases here in question. It was decided by that great judge, whom Duer says, "is usually termed the father of com- "mercial law in England". (Record, p. 324.) A peculiar fact about PLANCHE v. FLETCHER is that *it is "on all-fours" with the above case, before our Supreme Court,*

of Buck v. Chesapeake Ins. Co. The only difference is the use in one case of a false clearance, and in the other of false letters. The principle under consideration, *the very reasoning* and conclusion are the same. This would seem to conclude the discussion.

We have also Mr. Duer's direct criticism of the Horneyer and Oswell cases on page 310 of the record, where he adopts what he calls "a very just observation " of Benecke" on them.

The foregoing considerations are a *direct* attack upon the *authority* of Horneyer v. Lushington and Oswell v. Vigne.

We have, however, shown that the policy in question is different from the policies construed in those cases, and, as already suggested, having in view the unjust and illogical nature of those decisions, *the courts will not extend their authority beyond those precise facts.*

In view of the foregoing considerations, we think the jury "decided the law aright", when they found that, under the facts of the present case, the insurer was liable even under the English law, and if so, the verdict, under the authority of the cases hereinbefore cited, (p. 7), must stand.

But, assuming that it was the duty of the court to give the foreign law to the jury as law, and not as fact,

2. The court did construe the contract for the jury in the light of the law of England as the court understood the law of England from the evidence in the case.

It so happens, however, that in this respect the Circuit Court adopted the view for which we have hereinbefore contended. It expressed that view in the following instruction:

(pp. 338-339) "If you shall find that this contract is made and executed in England, and shall further find from the evidence that by the law of England, unless the vessel has express permission from the insurer to use false papers, an insurer is discharged where a vessel is condemned for using such papers, then you must further determine from the evidence whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade as a necessary incident thereto.

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

"It is also in evidence that under the law of England, 'every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself', and further 'that what is actually done by such a ship, on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed.

"If, therefore, you shall find that the permission to run blockade carried with it by implication a permission to use false or simulated papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question, does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers."

This instruction discloses the error of appellant when he says, referring to his own requested instruction, (Brief, p. 14):

"Judge Van Fleet refused to give these instructions, *not on the theory that they incorrectly expressed the British law*", etc.

While it is true that the trial court subsequently told the jury that the law of a foreign country is a question of fact for them to pass upon, he, nevertheless, in the foregoing instructions, expressed his opinion of what that law was, and so laid it down to them for their guidance.

We shall hereafter find that he gave the same kind of an instruction upon each of the several issues of foreign law presented by the pleadings.

Under these circumstances, the only *practical* question before this court is, whether or not the trial court was justified by the evidence in the case, in so construing the law. We submit, in view of the foregoing considerations, that he was. We therefore arrive at the same result as if the court had failed to instruct the jury upon the law, but the jury nevertheless "decided the law "aright." In either event, the question whether or not the court should have given the foreign law to the jury as law, or left it to them to treat as fact, is a mere moot question. This court is only called upon to determine whether or no the trial court (or the jury, as the case may be) was justified by the evidence in construing the law of England as construed in the foregoing instruction.

So, also, should this court so determine, then, as already suggested, the question raised concerning the evidence of the witness Comyn as well, becomes immaterial, because that testimony only tends to subject the policy to the American instead of the English law, and there would then be no difference between them as applied to the facts of this case.

In pursuance of the foregoing considerations, we respectfully submit that the "Assignment of Errors Relied upon" marked in appellant's brief 1 a and 1 b (p. 4 to 8) and argued from pages 12 to 34, inclusive, do not disclose any reversable error.

II.

ERRORS ASSIGNED WITH RESPECT TO THE TESTIMONY OF WITNESS COMYN.

These alleged errors are covered by the 12th, 13th, 14th, 15th, 18th and 27th assignments of error.

The 12th assignment is based upon the ground that the question was leading, (See pp. 158 & 159, Record), which is discretionary with the court. The question and answer further show that the only purpose was to identify the witness as the person who negotiated for the policy, which had already been received in evidence. (Record, pp. 136, 137, 138.)

The 13th assignment (Brief, p. 7), is also based upon the ground that the question is leading, and is subject to the same reply that it is discretionary with the court. (See Record, p. 159.) If it were error, it is cured by the cross-examination, (Record, p. 160), where counsel for defendant himself asked for and obtained the same testimony. (Record, pp. 160-165.)

The 14th assignment (Brief, p. 8), is based upon the ground that it is "irrelevant, incompetent and immaterial, and hearsay". The "irrelevant, incompetent and immaterial" is no valid exception, and the testi-

mony referred to is in no sense hearsay. Mr. Comyn did not testify, nor attempt to testify to any matter not within his own knowledge. Furthermore, the motion was directed to "*all* the testimony of witness Comyn" upon the subject. If, therefore, part was hearsay and part not hearsay, the motion was properly overruled.

The 15th assignment of error (copied on page 8 of the brief), *has no foundation in the record. No such motion as therein set forth was made at the trial or appears anywhere in the bill of exceptions.*

If it had been made in the terms set forth in the assignment of errors, it would still not be a valid exception, because it is only grounded upon the general objection that it is "irrelevant, incompetent and imma-" terial", which is no exception at all.

The 18th assignment is pointed to the same testimony as is the 14th assignment, but contains a misstatement with respect to the testimony, by reason of which the particular testimony to be stricken out is not properly indicated. It calls for striking out "all the testimony " concerning conversations regarding the prepayment " of premiums as a consideration for the *writing* of the " policy", while there was no testimony whatsoever regarding the prepayment of the premium as a consideration for *writing* the policy. The testimony is confined entirely to a condition precedent to the *delivery* of the policy.

Appellant does not include this assignment in his brief as one of the "assignments of error relied upon", but as it is the only one where a real exception was taken, we will not pass it by.

Should the court rule against our objection above stated, the only material part of said assignment is the exception on the ground that the testimony "cannot be " used to vary the written instrument."

That objection must be considered in connection with the instruction of the court to the jury upon the same subject, which instruction is assigned as error in assignment No. 27, (Record, p. 383), and is as follows:

"The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar, or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant for that purpose.

"In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they may have been disclosed to you what the fact was in that regard here."

The purpose of the testimony was to show that the contract of insurance did not become effective in England, but was completed and became effective in California. It would then be controlled by the local law, and not by the foreign law.

THE INSTRUCTION ABOVE QUOTED, WAS, UNDER THE EVIDENCE AND THE LAW AS FIXED BY THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, PERFECTLY PROPER.

The evidence showed a procurement of the insurance by Bowring & Co., Ltd., insurance brokers in London. Comyn, as their agent, had a place of business in San Francisco. As such broker, he applied for the insurance to his principals in London. The policy came to San Francisco for delivery and the premium was there paid.

Precisely the same facts and transaction appeared in the case of

HOOPER v. STATE OF CALIFORNIA, 155 U. S., 648, and are there stated by the court in the following language:

"Johnson & Higgins were average adjusters and brokers in New York city. Hooper, the plaintiff, as their agent, had a place of business in San Francisco. As such broker he applied for the insurance to his principals in New York city; the policy came to San Francisco for delivery and the premium was there paid."

Under these facts, the Supreme Court held that Johnson & Higgins became the agents of both parties, and hence that the contract of insurance was procured within the State of California. (155 U. S. 657-658.)

The question arose under a prosecution for a violation of that provision of the Penal Code which prohibits any person from procuring any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance.

It was argued at the bar, that *Hooper was the agent of the insured,* and not the agent of the foreign company, the same as it is suggested in this case that Comyn, or

Bowring & Co., were the agents of the Dollar Steamship Company, and not the agents of the Maritime Insurance Company. The question was stated by the Supreme Court in the following language:

"The argument is this: the act punished is procuring for a resident; in order to procure for another, the procurer *must be the agent of such other;* hence the contract of insurance was procured *by the agent of the insured,* and not by the agent of the foreign company, and inasmuch as the foreign company was not, and under the law could not be technically within the State for the purpose of giving its assent to the contract, the insurance must have been procured *without* the State."

To that argument the court made reply:

"The admission that the insurance was procured for a resident from a foreign company, which had no agent in the State, *does not exclude the possibility of its having been procured within the State.* If it were obtained for the resident by a broker who was himself a resident, this would be procuring within the State and be covered by the statute.

"The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring — to bring about the 'meeting of their minds' which is necessary to the consummation of the contract. In the discharge of his business *he is the representative of both parties to a certain extent.*"

This is a controlling authority, and the decision is founded *not* upon a construction of the word "agent" *in a statute,* but distinctly upon the ground that such is the *common law relation* of the parties under the facts stated. Whatever, therefore, there may appear contrary to this in the language of United Firemans Insurance

Co. v. Thomas, cited by appellant, must be regarded as erroneous. At the same time, though the reasons given for that decision are, in the face of Hooper v. State of California, erroneous, it might very well be sustained upon a principle which clearly distinguishes it from the case at bar. It is this: The reasoning is *too broad.* It is pointed to a *general agency,* whereas the case at bar rests upon a *special agency.* In the language of the Supreme Court, "he is the representative of both parties " *to a certain extent*" which "certain extent" is defined by the facts of the case *to the delivery of the policy and the collection of the premium.* But in United Fireman's Ins. Co. v. Thomas, it was contended that "Prindiville, " by reason of the facts stated, was the agent of the in- " surance company *in such manner and to such extent* " that the company is *chargeable with the knowledge* " *that he possessed* of other insurance upon the prop- " erty insured." (pp. 128-129.) When, therefore, that court said that they were "of opinion that he was not, " and that the insurance company was not bound by his " knowledge", they, no doubt, decided right; but the reason they gave for that opinion was wrong in that it was not sufficiently limited.

It is sufficient to say of the authorities following United Fireman's Ins. Co. v. Thomas, on page 33 of appellant's brief, that they do not sustain the point to which they are cited.

Nor, as a matter of fact, *is it true, as stated in appellant's brief,* that "*Here there is no evidence at all to*

"*show the duality of the agency*". It will not do, as appellant has done (Brief, pp. 12 & 31) to place before the court *that part* of the evidence which seems to be most favorable to his contention; because, if there be *any* evidence in the case against his contention, which the jury had a right to consider, their finding is conclusive — the court will not go behind the verdict.

Now, the same facts appear in the case at bar as in Hooper v. State of California, where the Supreme Court held that they *did* establish the dual agency. See the evidence of how the contract was made on pages 160 and 162 of the Record.

See, also, the following on p. 143:

"Q. From whom did you receive it?
A. I got it from the agents, Bowring & Co.
Q. They were your *agents in placing the insurance*, were they not?
A. Yes, sir."

The facts of our case are even stronger, because Comyn, in addition to the facts appearing in Hooper v. State of California, demanded and received a guarantor for the premium as a condition precedent to the delivery of the policy. (Record, p. 165.)

The law having thus fixed upon Bowring & Co. this dual agency, it only remained for the jury to determine in what particular the broker was the representative of the one or the other of the parties — to distinguish those acts of the broker which were in furtherance of the agency of the assured from those acts which were in

furtherance of its agency of the insurance company. For this purpose they are guided by what would seem to be *an unerring inference from the nature of the act itself,* for, when treating with the plaintiff in making a condition that the policy should only be delivered to it on the payment of the premium and in exacting a guarantor for the same, Comyn could only have been acting for and on behalf of the insurance company, since the condition was against the interest of the plaintiff and in favor of the interest of the defendant. Likewise, the part taken by him in the performance of that condition, to-wit., the actual delivery of the policy and receipt of the premium, he could again only have been acting for the insurance company, whose interest alone was being thereby protected.

Therefore, there was no error in the instruction. The jury's finding upon that fact is, of course, conclusive.

Again, as we have already indicated, the decision in Hooper v. State of California, so far as relates to the place of contract, is based upon the same facts as those that appear in the case at bar, and hence that decision *fixes the law of this case with respect to the lex loci contractus,* if the testimony under consideration be admissible. In that respect it is in line with other decisions of that court holding that, where the contract provides that it shall not take effect until the first premium has been paid and the policy delivered, the contract is governed by the law of the place where those acts are performed.

This we understand to be settled in the decision of

MUT. LIFE INS. CO. v. COHN, 179 U. S. 262;

on a writ of certiorari from this court. Also, EQUITABLE LIFE INS. CO. v. PETTIS, 140 U. S. 226.

Before leaving the consideration of the case of HOOPER v. STATE OF CALIFORNIA, and in order to prevent a possible misapprehension, we call attention to the fact that the transaction testified to in the case at bar was not prohibited by the section of the Penal Code referred to in that case, because the Maritime Insurance Company, with which the present transaction was had, had complied with the insurance laws of this State and was doing business here in accordance therewith. (Livingston, Rec. p. 293).

There remains to consider, therefore,

WHETHER OR NO THE TESTIMONY OF COMYN WITH RESPECT TO THE AGREEMENT FOR PAYMENT OF PREMIUM AND DELIVERY OF THE POLICY WAS INADMISSIBLE UPON THE GROUND, AS STATED, THAT IT TENDED TO VARY A WRITTEN CONTRACT.

That exception appellant does not urge in his brief, and so we assume it is abandoned, and we think wisely, for there are several conclusive replies to the suggestion:

1. There is nothing in the contract respecting the time or place of delivery of the policy, or the time or manner of payment of the premium.

The contract contains a recital of a *promise to pay* the premium, which implies a collateral agreement with respect thereto.

The recital is as follows:

"Whereas it hath been proposed * * * by M. S. Dollar Steamship Co. * * * to make with said Company the insurance hereinafter mentioned and described.

"Now This Policy Witnesseth, that in consideration of the *said* person or persons effecting this policy *promising to pay*" the premium, etc.

We are entitled, therefore, to prove the collateral agreement so implied, and the whole thereof, whether it rest in parol or otherwise. This includes the stipulation with respect to the delivery of the policy. What are the terms of that promise? How, when, where, on what conditions, if any, was that premium to be paid?

Because the policy came to plaintiff through the brokers, Bowring & Co. of London, the defendant *assumes* that Bowring & Co. of London were our agents to receive such delivery, and that the "promise to pay" was the promise of Bowring & Co. upon which they were personally liable. (Brief, pp. 30 & 32.)

The policy does not bear that construction. It was the *M. S. Dollar Steamship Co.,* and not Bowring, who " proposed to make with said Company, the insurance", and hence the Dollar Co. is "the *said person or persons* " effecting this policy", who "promised to pay."

We have already seen how the law treats the transaction with respect to Bowring's dual agency. So far as the policy itself is concerned it contains no provision, either express or by legal import, making Bowring & Co. plaintiff's agent to receive delivery of the policy, or anything with respect to the time, place, or manner of

such delivery, or of the payment of the premiums. How, then, can evidence, showing a collateral agreement with regard to those matters, tend to vary the contract?

The proposition is elementary and is stated by the text writers in the following language:

"Having thus pointed out the class of instruments to which the rule applies, it may next be observed that the rule does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter."

TAYLOR ON EVIDENCE, (1892) Sec. 1135.

"It is almost superfluous to observe, that the rule is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject matter."

TAYLOR ON EVIDENCE, Sec. 1049.

2. The reference to the payment of the premium in the policy is a mere *recital of the consideration* for the insurance, and as such is always open to parol proof to enlarge, explain or even to contradict it. The real consideration of a contract may always be proved, notwithstanding the consideration mentioned in the contract itself.

HIGGINS v. HIGGINS, 46 Cal. 263-265.

In that case oral testimony was admitted to show that a bargain and sale deed to a married woman, which by legal import, created a community interest in the property, was made and intended as a gift to her, and

hence her separate property. The court said that:

"The proof does not contradict or vary the written instrument except in so far as it explains the consideration which it is always competent to do, even in an action at law."

Again, in INGERSOLL v. TRUEBODY, 40 Cal. 610, 611, it was held that:

"Whilst the grantee in a deed will not be permitted by parol to contradict, vary, or enlarge the *operative* words of a conveyance so as to defeat, change or modify the estate, he may nevertheless disprove collateral facts recited in the instrument which are not essential to the validity of the estate granted."

This is followed by a reference to the decision of RHINE v. ELLEN, 36 Cal. 362, concerning which the court says:

"The grantee was permitted to prove by parol *that the consideration was wholly different from that stated in the instrument,* and depended on conditions which had not happened and which might never happen."

The Supreme Court of the United States, in an appeal from the United States Circuit Court for the District of Massachusetts, made a similar ruling. The contract contained a provision, "Know all men by these presents " that I * * * in consideration of $15,000 to me " paid by Stephen Dow * * * do hereby assign, sell, " convey", etc. The plaintiff offered to prove, among other things, "That as a part of the consideration of the " instrument, the defendant promised to pay the debts " of the plaintiff owed to Hall and others named in the " instrument, and the court refused to admit the evi- " dence." This the Supreme Court held to be error, and said:

"It is contended by the defendant that the instrument contained an admission of the receipt of the entire fifteen thousand dollars, and the question on this branch of the case is whether the plaintiff is precluded from showing the true state of facts. It is well settled in Massachusetts that a recital in a deed acknowledging payment of the consideration stated, is only prima facie proof, and is subject to be controlled or rebutted by other evidence.

* * * * * * * * * * *

"So, too, the evidence of a promise by the defendant as a part of the consideration of the instrument, to pay the debts which the plaintiff owed to Hall and others named in it, was admissible.

"*It is elementary learning that evidence may be given of a consideration not mentioned in a deed provided it be not inconsistent with the consideration expressed in it.* 1 Greenl. Ev. 283; 2 Phil. on Ev. 353."

3. The rule excluding parol testimony does not exclude evidence of an oral agreement which constitutes a condition upon the performance of which the written agreement is to go into effect.

The testimony in question is introduced for the purpose of proving a condition precedent to the policy becoming operative.

Assuming that the policy was delivered to *plaintiff's* agent in London, it was competent to show by parol testimony that such delivery was not intended by the parties to be a final unconditional delivery creating an effective contract, but that a condition was yet to be performed before it became effective. Such testimony appears to us to be in the same category with evidence of the execution of the contract which always rests in parol. Delivery is, in fact, a necessary element of its

execution, and in its last analysis, this is simply evidence to prove that Bowring & Co. were not plaintiff's agents *to receive delivery of the policy.*

That parol testimony is admissible to prove a condition precedent to the full delivery and acceptance of the policy, and its non-performance so that the contract never went into effect, seems to be settled law.

TAYLOR ON EV., sec. 1135;
HARTFORD F. INS. CO. v. WILSON, 187 U. S. 467;
WARE v. ALLEN, 128 U. S. 590;
BURKE v. DULANEY, 153 U. S. 228.

It was said by the court in HARTFORD FIRE INS. CO. v. WILSON, 187 U. S. *476,* quoting from a decision of Justice Peckham sitting in the New York Court of Appeals:

"This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and *until such condition precedent was complied with* or waived, no fully executed and valid contract of insurance existed between these parties."

It must, therefore, be equally admissible to prove such condition precedent in order to show that the contract *did not go into effect at a particular time or place,* and to show when and where the contract became effective by an unconditional delivery.

In fact we think that is a direct result of the application *to the facts of this case* of the decision of the Supreme Court in the case of DISTRICT OF COLUMBIA v. CAMDEN IRON WORKS, 181 U. S. 453. There

" 'The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its

complete delivery to the defendant, within 136 days after the date of the execution of the contract.' " (p. 455.)

It also contained a witness clause that the parties " have hereunto set their hands and seals the day and " year first above written." The date thus referred to was June 29th, 1887. (p. 454.) Plaintiff "proved that " the contract was not executed and delivered by the " commissioners before August 4, 1887. The evidence " to this effect was objected to by defendant, the objec- " tion overruled and exception taken." (p. 455).

The court said (p. 461):

"The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within 136 days from its date, but 'after the date of the execution of the contract.' It is well settled that, in such circumstances, it may be averred and shown that a deed, bond, or other instrument was in fact made, executed, and delivered at a date subsequent to that stated on its face.

"In United States v. Le Baron, 19 How. 73, 15 L. ed. 525, it was ruled that a deed speaks from the time of its delivery, not from its date; and Mr. Justice Curtis, who gave the opinion, cited Clayton's Case, 5 Coke, 1; Oshey v. Hicks, Cro. Jac. 263, and Steele v. Mart, 4 Barn. & C. 272; to which the court of appeals added Hall v. Cazenove, 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, *are not precluded from proving by parol evidence when a deed or contract is actually made and executed,* from which time it takes effect."

We feel that we have treated this question at unnecessary length, it being so well settled and elementary, but

it is raised by the exception, and we deem it better to err, if at all, in this direction.

We conclude, therefore, that the testimony of Comyn was admissible, and that the instruction with respect thereto was correct.

The same proposition follows, as that stated at the close of the consideration of the question regarding the foreign law. If this testimony be admissible, it fixes the American law as the *lex loci contractus,* and appellant could suffer no harm if the instructions on the foreign law improperly made that law conform to the American law.

This would render all consideration of the question discussed in the first 30 pages of appellant's brief, unnecessary, since those questions become immaterial.

III.

RESPECTING THE DUTY OF THE COURT TO INSTRUCT ON FOREIGN LAW, AND THE INSTRUCTIONS GIVEN IN THIS CASE.

Though we think we have satisfactorily shown that the foreign law, *as proved,* does not sustain appellant's allegations of its nature, we are, nevertheless, not prepared to admit that it is the duty of the court to instruct on said law *in the manner contended for by appellant.*

That there is a conflict of authority upon the question as to whether the court shall leave the entire matter to the jury as a question of fact pure and simple, must be conceded. But a distinction seems to be admitted, even

by those authorities that hold it to be a question for the court and not for the jury, between those questions where the evidence of the foreign law is documentary, that is, statutes or decisions, and those cases where the evidence is parol testimony.

As we have both classes of testimony in the case at bar, it would seem that even under those cases most favorable to appellant, the question must still, in the present instance, be submitted to the jury. This because the two classes of evidence cannot be segregated, and where there is a question of fact to be submitted to the jury the court will not be warranted in withdrawing it from the jury simply because some of the evidence is of a contrary character.

1. The text writers cannot be accepted as authority, where the sources of the law are so conflicting as in the present case. The court cannot, justly, shift to the text writers the responsibility of weighing the decisions and coming to a conclusion. This is more evident from the fact that the text writers themselves are not agreed upon the subject.

Wigmore on Evidence, Sec. 2558, cited by appellant, admits that the weight of the decisions is in favor of the submission of the question to the jury, and says:

"It is *more generally* held that a foreign law is a matter of 'fact', i. e. its existence to be determined by the jury."

The statement as to what he deems the better view, is only an expression of his opinion as *against* the general

trend of authority; but the decisions are the law, and his opinion, however good in theory, is *not* law.

In this connection it is not out of the way to observe that Mr. Wigmore has not hesitated, on more than one instance, to overrule the Supreme Court of the United States. But the decision of the Supreme Court of the United States *is* the law by which we are bound, and Mr. Wigmore's opinion of what it *ought* to be, is not.

Story on Conflict of Law, Sec. 638, does not attempt to lay down the rule as contended for by appellant, and only answers the question as to whether the foreign law is "to be proved as facts to the jury, * * * or as "facts to the court", by saying, *"it would seem"* as facts to the latter.

In the Note (a) appended to this paragraph (8 ed. p. 869), the following appears:

"But when the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, *or as to any point of unwritten law,* the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony."

So, also, in the Note (1) to the same section, where the question was whether a written instrument is evidence under foreign law, the following appears:

"It is true that if what the foreign law is, be a matter of doubt, the court may decline deciding it, and may inform the jury that if they believe the foreign law, attempted to be proved, exists as alleged, then they ought to receive the instrument in evidence", etc.

In the 6th Edition of the same work, by Judge Redfield, Sec. 338 (a) it is said that it must be proven to the jury like any other fact.

American & English Enc. of Law.—The section quoted by appellant from the second edition of this work says that the weight of authority is in favor of submitting the question to the Court, but some jurisdictions hold that it should be submitted to the jury, and notes the distinction above set forth, between documentary and oral evidence of the law.

In the first edition of that work, Vol. 19, p. 635, the contrary doctrine is laid down as to the better opinion. It is said:

"Whether the existence of the foreign law is a question for the court, or is to be proved to the jury as a matter of fact, is a point on which there is a conflict of opinion, *the better view apparently being that it is a question for the jury.*"

In support of the view that the foreign law is to be proved to the jury as other facts, that quotation is followed by a long list of authorities, among which are also the text writers, Taylor on Evidence, Best on Evidence, and Wharton on Evidence.

Greenleaf on Evidence.—We have not had opportunity to examine this text writer, but the quotation in appellant's brief does not attempt to lay down the law upon the subject, but only gives that author's idea of which "is the better opinion."

Cyclopaedia of Law & Prac.—(16 Cyc. 887) states the rule as follows:

"Where the testimony is uncontradicted, is based on a document or harmonious judicial opinions, or is adduced in connection with an offer of a written instrument as evidence, the effect of the evidence is to be de-

termined by the court. But if the evidence is conflicting, the jury must ascertain under proper instructions, what the foreign law is."

2. Turning from the text writers to the decisions, we will not undertake to discuss them at length. They are collected in the volumes above referred to.

Referring, however, to the particular ones upon which appellant seems to rely, we have this to say:

Mexican Natl. R. R. Co. v. Slater, does not seem to help us very much. It might very well be that proof of the foreign law *in that case* was needed to *aid* the court in its rulings during the progress of the trial, and in giving its instructions to the jury, but it does not necessarily follow from that, that the proof was not also addressed to the jury for it to determine as a fact what that law was.

The further suggestion, that, because the appellate court said that, under the facts of that case, it could take judicial notice of the foreign law, therefore the decision tended to prove defendant's present contention, is not in accord with the law as laid down by the Supreme Court upon that subject.

The rule is stated in Hanley v. Donoghue, 116 U. S. 7, in speaking of a proceeding on writ of error to a state court, as follows:

"As in the state court the laws of another state are but facts requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk (supra). The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: 'That the laws of a foreign nation designed only

for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, *is limited to the statement made in the court below,* cannot be questioned.' ''

It will thus be seen, that a finding of fact of the lower court as to what the foreign law is, is conclusive in the appellate court; which would seem to indicate the reverse of the defendant's present contention; because the finding of fact by a court in a cause tried without a jury, is in the same category with a finding of fact found by the jury in a cause tried with a jury.

The case of Consequa v. Willings, 6 Fed. Cas. 336, comes sufficiently near to laying down a rule which can be understood and followed, and we are prepared to accept the proposition as there laid down, as the rule to be adopted in considering the question of the instructions given and refused in the present case.

We are more particularly moved to this view, because

''The judges of the federal courts are not controlled in their manner of charging juries by the state regulations. Such part of their judicial action is not within the meaning of section 914 R. S.'' City of Lincoln v. Power, 151 U. S. 442.

In all jurisdictions, however, Federal as well as State, it is admitted to be settled

''That no court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice.'' Hanley v. Donoghue, 116 U. S. 4.

In Consequa v. Willings,

"*It was contended,* that the jury are alone competent to decide upon the credit of witnesses called to prove what is the law or usage of a foreign country; yet it belongs to the court to decide, what is the law so proved, and in what manner it is to be construed. That it is the exclusive province of the court to decide upon the weight of evidence, and the fact which is proved by it, if the witnesses called to prove it are believed by the jury; but in this case the whole was left to the jury."

To this contention,

"*It was answered;* that the usage of trade and foreign laws, are to be proved like any other fact; and, consequently it belongs to the jury, to decide whether they are proved or not. As to the construction of foreign laws, when proved, it was admitted that the court is to decide upon them. But *the only point* as to this matter was, *whether* the conduct of Consequa *proved the usage or not,* and this was properly left to the jury. *No question of construction arose in the cause.*"

On the proposition so stated, Washington, Circ. Justice, (being then a member of the Supreme Court and sitting in Circuit), said:

"The written or statute laws of foreign countries, are to be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parole evidence, and *when proved,* I admit that it is for the court *to construe them, and to decide upon their effect. Whether the law or usage is sufficiently proved or not,* is a question upon which the court *may express an opinion or not, as may seem proper.* I have always thought that the court may give an opinion upon the weight of evidence, if it be believed by the jury; * * *

* * * * * * * * * *

But the court may decline to give an opinion to the jury, upon the weight of evidence; and *if it be doubtful, it is in general most proper to leave it to the jury.* * *

* * * * * * * * * *

The present case was precisely within the distinction above stated."

The court then considers the evidence affecting the usage, and concludes:

"It was, therefore, left to the jury, and I think properly so, to decide the fact one way or the other."

We might epitomize the rule thus stated, by saying that the existence of the foreign law is a fact to be proved, and, like any other fact, to be addressed to the jury. *When proved,* its meaning and construction, is for the court. In other words, it is in precisely the same category as a written instrument. The existence of a contract in writing is addressed to the jury. If it requires construction, the court construes it, and as construed, leaves the whole matter to the jury. In the Consequa case, no question of construction arose. The only point was as to the existence of the law, and so the whole question was left to the jury without instructions.

3. The Issues on Foreign Law and Instructions Given in This Case.

Let us now see what issues are presented in this case, and how they were treated.

The pleading sets up the following as the law of England:

1. "That the law of Great Britain at all the times in said third amended complaint mentioned was, that an insured person *should not conceal from his insurer on a marine risk,* any facts, which, if known to the insurer might prevent him from undertaking the risk, and that *the concealment of such facts avoided the policy of in-*

surance given by such insurer to such person. (Answer Record p. 100.)

2. "That at all times in said third amended complaint mentioned, it was the law of Great Britain that where a policy of insurance insures a vessel carrying contraband cargo against the risk of capture, seizure or detention, in the form of the policy hereunto annexed, marked Exhibit 'A', and made a part hereof, or of the policy set forth in the complaint, and the said capture, seizure or detention is caused by the carriage by the officers of said vessel of false or simulated papers falsely describing her national character, route or destination, or the character or destination of her cargo, and the judgment or decree of the prize tribunal of the nation making the said capture, seizure or detention expressly states as its ground of condemnation that the vessel carried such papers, and there was no express leave given the insured to carry such papers, although it might be notorious that the trade in which the vessel is engaged could be much more advantageously carried on with such papers, and although it is the custom of the trade and voyage for which the insurance is issued to carry such papers, the underwriter on such policy is nevertheless freed from liability from loss arising from any such capture, seizure or detention." (Answer, Art. II, Record pp. 103-104.)

3. "That the law of Great Britain at all the times in said amended complaint was: that the insured and policy of marine insurance insuring a vessel against capture, seizure and detention impliedly warrant the carriage by the vessel of the neutrality papers above described, and it is a further law of Great Britain that a breach of said implied warranty avoids the policy." (Answer, Art. IV, Record p. 108.)

4. "That it was the law of Great Britain at all of the times in said third amended complaint mentioned that where insurance is made in the form of the policy hereunto annexed and marked Exhibit 'A' and containing the words, 'at and from' the port of San Francisco, and the vessel remains 'at' the port of San Francisco for several days after the delivery of the policy, whence

it sails on a voyage different from the voyage insured against, the insurer is entitled to retain his premiums against the demand of the insured." (Answer, Record p. 114.)

On these issues, the defendant requested instructions in the *following form:*

Request No. 3.—"It was the law of Great Britain between December 1, 1904, and May 1, 1905, that where on a voyage *under a policy of insurance such as has been proved in this case,* a vessel is condemned for the reasons set forth in the decree of the Prize Court of Yokosuka, Japan, the insurer is not liable under such a policy for such a loss." (Record p. 353.)

This instruction is not a request for the court to *construe* the law of Great Britain, but it is a request for the court to instruct the jury *what the law of Great Britain is.*

It was properly refused,

1. Because it invaded the province of the jury by directing them upon the fact as to the existence of the law *in the face of controverting testimony;*

2. Because it did not properly state the result of the evidence upon the subject. We contend, and we think the court will agree with us in the contention, under the evidence introduced, the requested instruction does not state the law of Great Britain correctly.

The error of defendant in this respect is shown by that portion of his exception which states, that he excepts

"upon the further ground that the evidence *conclusively shows* the law of Great Britain to have been as stated in the requested instruction." (Record, p. 353.)

Request No. IV is as follows:

"It was the law of Great Britain between December 1, 1904 and May 1, 1905, that where a vessel sails on a voyage insured *by a policy such as has been proved in this case,* during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation." (Record pp. 353-354.)

Request No. V is but an amplification of Nos. III and IV, so as to cover the custom of the trade to carry such papers, and is as follows:

"It was the law of Great Britain between December 1, 1904 and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case, during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture—the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances

even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers." (Record pp. 354-355.)

Request No. VI is but an amplification of Nos. III, IV and V, so as to cover the fact that such papers tended to decrease the risk of loss, and is as follows:

"It was the law of Great Britain between December 1, 1904 and May 1, 1905, that where a vessel sails on a voyage insured by a policy such as has been proved in this case during the time of war between Japan and Russia, and at a time when she was likely to meet the war vessels of both Russia and Japan, and she sailed with a complete set of ship's papers giving her destination as Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, and the first set was to be presented in the event that the vessel was overhauled by the Japanese, and the second to be presented in the event she was captured by the Russians, and she was captured and condemned by the Japanese for having carried and used the first set of papers to evade capture, the insurer under such a policy would not be liable for such a capture and condemnation. And it was also the law of England during said period that the insurer would not be liable under the above circumstances even if it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers, and that it was the custom of such trade to carry such papers, and it was shown that the fact of having such papers on board actually tended to decrease the risk of such loss." (Record pp. 355-356.)

The observations hereinbefore made respecting request No. 3 apply as well to each and all of the foregoing, including the exception on the ground that "it is conclusively proved." (Record, .)

Requests No. VII to X, inclusive, do not purport to touch the foreign law, the exception being upon the ground that they contain the law of this country.

Request No. XI is as follows:

"It was the law of Great Britain between December 1, 1904 and May 1, 1905, that an insurance company was not liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, and did not change her destination from Moji, Japan, to Vladivostock, Russia, until after she had sailed. (Record p. 359.)

The foregoing observations apply to this as well. Furthermore, the law affecting the subject matter of this instruction was undisputed at the trial, and the court so instructed the jury, and made proper application to the facts as proved. (Rec. pp. 337 and 340.)

Request No. XII.—The court gave this, but so modified as to truly state the law upon the subject. (Rec. p. 340.)

Requests Nos. XIII and XIV were given. (Rec. pp. 340, 341.)

While some of these several requests were refused, the court did, in its instructions to the jury, construe the law upon the subjects therein referred to, leaving the question of fact as to what the law was, to their consideration.

Instructions as Given by the Court.

1. As just suggested, where the law of England was undisputed, this court directly charged the jury upon the question.

To this effect is the instruction covering the defendant's requests XI and XII. Upon that subject, the court instructed the jury as follows:

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance the real destination of the vessel was Vladivostock, and the real purpose and intention of defendant was that she should go to Vladivostock notwithstanding her clearance was taken for Moji. If you find this to be true, the evidence is undisputed that, under the law of England, where the real destination is the port for which the vessel is insured, which in this case is Vladivostock, the clearance for Moji does not constitute an abandonment of, nor a failure to sail upon, the insured voyage." (Rec. p. 337.)

And again,

"An insurance company would not be liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, intending to go to Moji and not to Vladivostock, and did not change her destination from Moji, Japan, to Vladivostock, Russia, until after she had sailed." (Rec., p. 340.)

2. Upon the question of simulated papers, the court construed the law of England, and instructed the jury as follows:

"If you shall find that this contract is made and executed in England, and shall further find from the evidence that by the law of England unless the vessel has express permission from the insurer to use false papers, an insurer is discharged where the vessel is condemned for using such papers, then you must further determine from the evidence, whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade, as a necessary incident thereto.

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

"It is also in evidence that under the law of England every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself, and further, that what is actually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed.

"If, therefore, you shall find that the permission to run blockade carries with it by implication a permission to use false or simulated papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question, does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers." (Record pp. 338-339.)

3. Upon the law as to concealment there was no instruction requested by the defendant. The court did, however, instruct the jury upon the subject, in the following manner:

"A concealment must be with respect to matters within the knowledge of the assured at the time of making the contract, and anything coming to his knowledge after that, however material it might be, need not be communicated to the insurer. There can be no concealment of an intention to use false papers imputed to the ship-owner if such an intention is necessarily implied from the application for permission to run blockade. * * *

* * * * * * * * * *

"If you shall find that this contract is made and executed in England, and shall further find from the evidence that by the law of England unless the vessel has express permission from the insurer to use false papers, an insurer is discharged where the vessel is condemned for using such papers, then you must further determine

from the evidence whether, under the law of England, such permission to use false papers be not contained in the permission to run blockade as a necessary incident thereto.

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject, of which this court will take judicial notice.

"It is also in evidence that under the law of England every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself, and further, that what is actually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to in every policy and to make a part of it, as much as if it was expressed.

"If, therefore, you shall find that the permission to run blockade carries with it by implication the permission to use false or simulated papers, then I instruct you that the carriage and use by the plaintiff of false papers on the voyage in question does not affect its right to recover, and that the defendant is liable, notwithstanding the use of false papers." (Rec., p. 338.)

4. Upon the law relating to the right to retain premiums, no instruction was asked, and the question does not arise as it is not the subject of any exception. Furthermore, the testimony showed a tender of the return of premiums, and a refusal to accept, and so the law set up in the answer became immaterial. We only mention this in passing, so as to avoid any misapprehension.

5. Finally the court instructed the jury that it was for them to determine from the evidence what the English law is, and directed them how they were to consider that evidence. The instruction is as follows:

"Among the facts in this case for the jury to pass upon is one which has given rise to some controversy be-

tween counsel as to whether it was a question of fact or a question of law, and that is as to what the law of England was at the time covered by this transaction; one counsel contended, and offered a number of very carefully prepared instructions with the request that they be given to the jury, upon the theory that it was the duty of the court to instruct upon what the law of England was during that period. But that is not the law, gentlemen of the jury. The law of the country, of a tribunal is presumptively within the knowledge of that tribunal, and under the law it is the duty of the Judge to charge the jury as to what the law of this country is; that is a part of his functions, as I have previously indicated to you. It is my province as the Judge of this court, to charge you what the law of this country is upon a given subject. But that rule does not apply to the law of a foreign country. What the law of a foreign country is in any given instance in its application to the issues presented in a case like this, is a question of fact, and it is for that reason that the parties are permitted to introduce evidence before the jury as to what that law is. You will pass upon that fact precisely as you pass upon any other fact in this case. You have had laid before you the evidence of certain witnesses claimed to be expert in the law of England. That is always admissible on a question of that kind. You have also before you reports of decisions of their highest courts of judicature; that also is a very high character of evidence as to what the law of a country is. You have also had read to you statements from text books by recognized authors of law books on the subject, and that also is a high character of evidence tending to show what the law of the country is. Of course, I appreciate necessarily that a question of that kind is bound to be more or less blind to a jury, but under the law it is one of their duties to solve it, and you must determine to the best of your ability by applying your judgment and your reason to the evidence upon that subject, what the law of England was at that time because it is claimed by the one side that if the law of England was a certain way then the result would be one way in its effect upon this controversy; and if it was the other way then the result

would be otherwise upon this controversy. Therefore it is essential that you determine that fact." (Record, pp. 344-345.)

We do not see but that this court has, in the manner of its instructions, complied with the letter of the rule as laid down in CONSEQUA v. WILLINGS. It has instructed upon all the issues, construing the law respecting the same according to the court's understanding of the evidence upon the subject.

Admitting, therefore, the contentions of the defendant to the full extent of his most favorable authority, no error can be affirmed respecting the manner of instructing the jury on the questions of foreign law.

Before concluding this subject, it may not be out of place to add some general observations upon some side issues suggested by appellant. It is said, (Brief, p. 16):

"Common sense revolts at the absurdity of a court whose every function is concerned with the interpretation of the law, turning over to laymen the determination of an intricate question of the British law of marine insurance. A system of jurisprudence which thus wastes the trained capacity of its officers and leaves its litigants to the gambler's hazard (at best, in such a case) or the prejudices (more likely, in San Francisco at that time) of an uninstructed body of non-professional men, cannot be expected to command the entire respect of the intelligent citizen."

If that suggestion be true, with respect to the submission of such a question to a jury, (which, by the way,

we do not regard as intricate), then it is an indictment of the jury system for the purpose of determining the great mass of questions of fact which, under our law, it is the unquestioned office of the jury to determine. There is nothing more intricate in the evidence of the English law in this record than the evidence in the great mass of litigation involving expert testimony. Not to speak of patent cases, we have, in our daily experience, intricate questions of fact depending upon scientific knowledge covering the entire field of human activity, which are daily submitted to juries for determination. It is a fond conceit of the lawyer to assume that his department of learning is *sui generis* in that respect. The architect, the civil engineer, the mechanical engineer, the electrical engineer, the mining engineer, the physician, the horticulturalist, the transportation man, the political economist, and even the plain commercial man dealing with the laws of trade, have, in their daily life more occult and intricate questions to deal with than the lawyer has in deducing the law from the statutes and decisions. And those questions of fact are daily submitted to the ordinary jury. The argument that the practice is "absurd", if well founded, should, therefore, be addressed to our whole system of jurisprudence, and not to that mode of determining the English law on this subject.

With respect to the suggestion of "prejudice", it will be borne in mind that this is not "an earthquake clause" case, but a case of marine insurance, against which

there is no evidence of any general public feeling in this community. This jury, a body of intelligent business men, could have had no feeling in this matter except such as might be raised in the breast of the calmest judge in passing upon such an "ungracious defence"— the attempt to withhold a premium of 25% while contending for a construction of the policy which, according to appellant's version, would *eliminate all risk of loss* — a practical fraud on the insured. Just fancy!

"The remarks concerning the insurer's want of grace do not apply to this case. Here had his true papers been presented to the capturing cruiser, showing the voyage to be to Vladivostock, *the vessel could not have been condemned.* The most the Japanese could have done would have been to detain the vessel and condemn the *cargo,* which was owned by Mr. Harry Hart, the charterer." (Brief, pp. 24 & 25.)

We had insured our ship *to a given destination.* The purpose of going there, was *to carry a cargo to that destination.* And we are calmly told that we should have given up the cargo — and hence the voyage, in order to avoid the risk of condemnation, for protection against which we have ~~had~~ paid 25% of the value of our ship ! !

IV.

ALLEGED ERROR OF THE COURT IN THE INSTRUCTION ON THE ISSUE AS TO WHETHER THE VESSEL SAILED ON THE INSURED VOYAGE. (Appellant's Brief, p. 35.)

We are unable properly to characterize the argument made under this head. It not only is without foundation

in fact, but the second half is also an attempt, on the part of appellant, to avail itself of a palpable and self-evident clerical error in the substitution of the word "defendant" for the word "plaintiff", in an instruction, where the context plainly shows the latter word to be intended.

1. The first half of the argument relating to *plaintiff's* intention and extending to the bottom of p. 36, is based upon a forced construction of a few lines of testimony *wrenched from its context,* and three lines of the instruction, also *wrenched from its context,* stopping in the middle of the sentence.

With respect to the testimony: Continuing for five lines after the quotation ceases we have the following:

"Q. Why did you make the change?
A. To go to Vladivostock?
Q. Yes, sir.
A. *That was my port of destination,* calling at Moji for coal—I did not get there." (Record, p. 174.)

We do not overlook the statement in the brief that "It is true that the captain *later swore,* AT ANOTHER "TIME, that Vladivostock was his true destination, and "that he was to call at Moji for coal." We will speak later of the comment following that. It is, however, evident, that what the witness said *at that time,* and *in immediate connection with the language quoted* by appellant, was a part and parcel of that language; whereas, what he might have said, "at another time", might or might not have qualified that language.

Now, for a true appreciation of the instruction, let us look at the rest of the testimony on that subject.

Cross Examination by *Mr. Denman,* p. 185:

"Q. As I understand it, that cargo was consigned to Vladivostock?

A. To order, Vladivostock.

Q. What *route* did you sail on to reach that port?

A. I *first of all* went up to try to go through La Perouse straits, went through the Kuril Islands, but I was stopped around there by the ice.

Q. *That was your intention when you left San Francisco was it to go that way?*

A. *Exactly.*"

And on page 186:

"Q. You went up to the Kuril Islands and wanted to take what is known as the inner passage?

A. No; there is no inner passage up there.

Q. What is the route you would take after you reached the Kuril Islands if you were going directly to Vladivostock?

A. That is the nearest route.

Q. By the Kuril Islands?

A. By the Kuril Islands.

Q. What channel is known as the Muchi channel, is there such a channel?

A. No such channel that I know of.

Q. What direction is Vladivostock from the Kuril Islands?

A. It is in a westerly direction.

Q. Westerly direction?

A. Yes, sir.

Q. How far?

A. I suppose it would be a thousand miles.

Q. Do you pass any land to the southerly of the Islands or any land of any kind to the southerly of that route from the Kuril Islands in to Vladivostock?

A. Yes, you have got to go through La Perouse straits.

Q. Between what islands are there straits?

A. Between Sachalien Islands on the north and Hokkido on the south.

Q. Is that one of the Japanese group.
A. Yes, used to be Yezzo.
Q. Which one of the group is it?
A. Northermost of the Japanese group.
Q. *Then you were intending to sail by the northern route to pass the most northerly of the Japanese Islands?*
A. *Yes.*
Q. *And go directly west from there to the port of Vladivostock?"*

(The answer is "Yes" in the deposition. No answer appears in the printed record.)

"Q. Why did not you clear for Vladivostock?
A. Well, I do not know why—might have to go in for coal.
Q. Why did not you clear for Vladivostock if you were going there?
A. Well, on account of the war risk, I understand.
Q. Then what precaution did you take in order to prevent the vessel being captured by one or another of the two contending navies?
A. Well, I took the precaution to keep away from them by attempting to go through the northern route. When I found I could not get through there I went through the straits in the night time."

On pages 198 & 199:

"Q. Now, Captain, what discussion did you have with any of the members of the Dollar Company regarding the precautions you were to take to escape capture?
A. If I remember right, in going to Vladivostock, to get there if I could. If I could not get there, go to Moji, and I think that was all we had. There was not very much said about it at any time.
Q. You were to go to Moji. Were you to sell your cargo there?
A. No, await instructions.
Q. To await instructions. You say that you had no discussion at all regarding any precautions to be taken to escape capture?

A. Well, we did have something to say about it, but exactly what we did on that occasion or what was said I do not exactly remember.

Q. What was said about what you were to do when you were overhauled by a Japanese cruiser?

A. Well, what was said about one or the other I am sure, I do not know what was said. *I was going to Vladivostock if I could get there.*"

* * * * * * * * * *

"I was just promoted to the position, and I was told that we were going to Vladivostock."

(p. 201): "Q. You say one way going to Vladivostock, now what was the other way?

A. Well, that we were to go to Moji for coal, go there for coal if you havn't got enough here, several things said about it."

Re-Direct Examination, (p. 205): "Q. I understand you to say when you left 'Frisco, your general instructions were to make Vladivostock, if possible?

A. If I could.

Q. If you found that you could not get to Vladivostock you were to go to Moji?

A. Go to Moji.

Q. And you would have reported from there to receive further instructions?

A. Exactly."

In addition to the foregoing, Robert Dollar, under cross-examination of Mr. Denman, testified that he instructed the master to sail for Vladivostock through La Perouse straits if they were not blockaded with ice. If they were frozen up, then to go through the Straits of Tsugar and through the Sea of Japan to Oskald Island. (pp. 144, 145, 146, 147.)

We do not overlook the affidavit of the clearance for Moji. The plaintiff's witnesses testified that it was a *false* clearance, for the purpose of misleading the Jap-

anese, (Record, p.) and did not give the *real* destination of the vessel.

We leave it to the court to determine whether the statement of appellant "that this instruction does not state the truth" is well-founded; whether the trial court erred when he said to the jury:

"The evidence of plaintiff's witnesses in this case is that at all times during the period of this insurance, the *real* destination of the vessel was Vladivostock,"

2. But let us finish the instruction to ascertain if the trial court did really take that question of fact from the jury. It continues:

"and the real purpose and intention of defendant was that she should go to Vladivostock notwithstanding her clearance was taken for Moji. *If you find this to be true,* then the evidence is undisputed that under the law of England where the real destination is the port for which the vessel is insured, which in this case is Vladivostock, the clearance for Moji does not constitute an abandonment of, nor a failure to sail upon, the insured voyage."

At the same time the court instructed the jury as follows:

"An insurance company would not be liable under a policy of insurance such as has been proved in this case, if the vessel cleared and sailed thereunder on a voyage from San Francisco to Moji, Japan, intending to go to Moji and not to Vladivostock, and did not change her destination from Moji, Japan, to Vladivostock, Russia, until after she had sailed." (Record, p. 340.)

Again, (Record p. 341):

"Unless the jury find that the steamer 'M. S. Dollar' departed from the port of San Francisco on a voyage to

Vladivostock, Siberia, and continued on said voyage and was so duly prosecuting the said voyage at the time of the loss sued for, the jury must find for the defendant."

Again, (Record pp. 342-43):

"If you find that any witness has deliberately told an untruth in any matter, you should view with the greatest care any other testimony of that witness with a view of determining its credibility."

* * * * * * * * * *

"Now, gentlemen, as suggested to you in response to a request from one of the parties, I have stated to you that if you find a witness has deliberately testified to an untruth, you must view with great care the balance of his testimony. That will indicate to your minds that you necessarily pass on the credibility of witnesses in this case. While the court gives to the jury the law, and the jury must be bound by it, *the jury are exclusively the judges of the facts;* and that includes, as I have indicated, the passing upon the credibility of witnesses."

Then follows a long instruction indicating the mode of determining credibility.

The court thus, not only directly and in connection with his statement of what the plaintiff's witnesses testified to, leaves the question of its truth or falsity to the jury, but distinctly tells them that if the vessel cleared and sailed on a voyage to Moji, intending to go to Moji and not to Vladivostock, and did not change such destination until after she sailed, the defendant is not liable; and unless *they find* that the vessel departed for Vladivostock and so continued on the voyage to the time of loss, they must find for defendant; concluding with a careful instruction on the credibility of witnesses, and advice that the jury are the exclusive judges of the facts.

Even, therefore, if there were any such doubt, as suggested by appellant, of the truth of the testimony "that he was to call at Moji for coal", the determination of that doubt is fairly left to the jury.

We might add, however, that the fact that Moji was out of the course, would cut no figure in the matter, in view of the state of the law on the subject, as testified to by Simey and Hamilton, and which we shall presently consider.

So, also, that it would be necessary to go to Moji for coal, is obvious from the fact that this vessel had made a trans-pacific voyage and would not be able to coal at Vladivostock, because coal was there required for war purposes, and Russia was so short that it was being brought into port by blockade runners at great hazard and expense. This vessel might, therefore, very well, as part of her hazard, take the risk of coaling at Moji.

This, however, was all left to the jury, and hence, is no longer open.

3. Let us now take up the second half of this argument, which is that the instruction "grossly misdescribes " the testimony as to the *insurer's* intent, or rather, mis- " creates testimony that nowhere exists." (pp. 36-37.)

This is based upon a clerical error—probably of the court reporter—in substituting the word "defendant" where "plaintiff" was intended. If given to the jury as it stands in the record, they could not possibly have been misled thereby. The context is bound to set them right.

If, on the other hand, we are to regard the matter without the aid of the context, it still *remains true* that "the real purpose and intention of *defendant* was that "she should go to Vladivostock, notwithstanding her "clearance was taken for Moji." While it is true, as appellant says, (Brief, p. 37) that "there is not a line of "evidence as to any intent of the defendant, the Mari-"time Insurance Company, to have the M. S. Dollar "*clear for Moji,*" so, also, it is true that the above language of the instructions *does not say* that there is any evidence of an intent *on the part of the defendant* that she shall *clear for Moji.* It only says that it was the intention of defendant that she *should go to Vladivostock.* That intention is evidenced by the policy introduced by plaintiff. Read the sentence of the instruction thus: "Notwithstanding her clearance was taken "for Moji, the real purpose and intention of defendant "was that she should go to Vladivostock."

Let us go a step further: The policy (plaintiff's evidence) provides for a cover "at and from San Francisco "to Vladivostock, while there, and thence back to a safe "neutral port." (Exhibit B, p. 368.)

Simey testifies, (Record p. 236):

"If Moji were merely a place of call on the way to Vladivostock *though out of the direct route thither,* there would be no failure to sail on the insured voyage, nor an abandonment thereof."

Hamilton testifies, (p. 259):

"Q. If in answer to the 28th direct interrogatory you shall say that the facts therein inquired of constitute

an abandonment and failure to sail on the insured voyage, state whether or not you would so consider it if the said port of Moji were a mere port of call en route to Vladivostock.

A. No.

Q. If in answer to the 28th direct interrogatory you shall say that the facts therein inquired of constitute an abandonment and failure to sail on the insured voyage, state whether or not you would so consider it if the said port of Moji were a coaling port where the said ship proposed to take on sufficient coal to enable her to proceed safely from Vladivostock to a safe neutral port?

A. No."

And again, *Simey* testifies:

"A. By the law of England if the vessel really sailed for Moji, Japan, and not for Vladivostock, she did not sail on the insured voyage. *If however, though her clearances and sailing were nominally for Moji, the intention throughout was to send her to Vladivostock, then she in fact sailed on the insured voyage,"* etc.

In view of that condition of the law, what harm can come to defendant by telling the jury it was "the real "intention of defendant that she should go to Vladi- "vostock notwithstanding her clearance was taken for "Moji." It certainly was the intention of defendant that she should perform such a voyage as the law permits under the terms of the policy. That intention is to be gathered from the policy and the law; and as that foreign law *is undisputed*, the whole question becomes a matter of construction for the court. Since the *language* of the instruction *accurately described such a voyage, as the law and the policy warranted*, it truly described the real purpose and intention of *defendant*. With this the argument would seem to be at an end.

It will be noted that the Court's instruction states the law in accordance with the above undisputed testimony of Simey and Hamilton.

We conclude with the language of this court in

NORTHERN PAC. R. Co. v. POIRIER, 67 Fed. 887:

"In considering the portions of the charge to which exceptions are taken, it may be conceded that sentences here and there may be found which if separated from the context, where the correct principle is announced, might either be calculated to mislead the jury, or, if standing alone, unaided or unexplained in other portions of the charge, might be considered erroneous. *But this method of construing a charge is unfair to the trial court. Its charge upon any particular subject must be considered in its entirety.*

"The question which is to be determined by the appellate court is not whether some technical error may not have *inadvertently crept* into the charge, but whether the charge, when taken as a whole, has presented the law of the case fully, fairly, and correctly to the jury."

In the same line is the following language of the Supreme Court in

CHICAGO R. R. Co. v. WHITTON, 80 U. S. 270:

"Nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, WHICH COULD NOT, when taken with the rest of the charge, HAVE MISLED A JURY OF ORDINARY INTELLIGENCE."

V.

THE DISTINCTION ATTEMPTED BETWEEN THE USE OF FALSE PAPERS TO MOJI, JAPAN, A PORT OF THE BELLIGERENT, AND THE USE OF FALSE PAPERS TO A NEUTRAL PORT. ALSO THE JUDICIAL NOTICE THEREOF TAKEN BY THE COURT.

This seems to us to be a very narrow and illogical distinction.

The use of false papers is admittedly for the purpose of deceiving the blockading belligerent. In the Japanese war it so happened that the blockading port was in the Japanese sea, and could only be reached by passing through a Japanese strait so narrow that you could see across. There are absolutely no ports in the vicinity of Vladivostock, for which the vessel could be cleared, unless it were either a Russian or a Japanese port. Japan was the mistress of the sea. To clear for a Russian port would, therefore, have been to insure capture. No alternative is left with any hope of making the voyage and avoiding Japanese capture, but to clear for a Japanese port. If there had been a neutral port in the vicinity, (as in the case of our Civil War), possibly such a neutral port might have been selected; but the choice between such ports would have been a question of judgment and expediency only.

The suggestion in the brief that the clearance for Moji "At once suggested to the Japanese to see if any such "goods were ordered from Moji", betrays ignorance of the manner and practices of trade. It is a practice, so common that this court may take judicial notice of it, that cargoes are cleared for ports to which the vessel

sails for orders. From there the vessel is sent to other ports, where the owner has found a market. For years, it has been the practice for vessels with cargoes for European ports to clear from San Francisco to Queenstown, where they receive orders to go to various ports all over the continent of Europe; and the same practice prevails in the Asiatic trade.

The suggestion, in the note that the Moji clearance did in fact put the Japanese on their guard because they stated they were on the lookout for the "Dollar" for some time, is in like error. The vigilance of the Japanese authorities on the Pacific Coast, in apprising themselves of the true destination of cargoes proceeding from here to the Orient, was as keen and well recognized as were any of their military precautions so remarkably exemplified in the war. In England, which country was her ally, the fact of the *insurance* of this cargo for *Vladivostock* could not be concealed. Hence, they were on the lookout for the "Dollar", not because of her clearance for Moji, but in spite of it.

So, also, with respect to the contention that the clearance exposed the goods to a Russian capture, (Brief, p. 39), which in the opening statement appears as follows (Brief, p. 2):

"There were also Russian cruisers sailing in these
" waters at that time, which might have captured her,
" and the Russian government would have been quite as
" likely as the Japanese to condemn her for the state-
" ment in her log, showing an attempted voyage to Vla-
" divostock by the northern route, on the theory that the

"Moji papers described the true destination, and the "log was a false means to evade Russian capture."

The futility of this suggestion is found in the fact that the goods were consigned to the Russian military authorities, and if the vessel fell into the hands of the Russian cruisers, she would be in the hands of friends.

If that be not enough, then, as we shall presently see, we have the express indorsement of the act in the case of LIVINGSTON v. MARYLAND INSURANCE COMPANY, 7 Cranch, 536, a case cited by appellant on this very point.

It is further said, that the custom to clear for a belligerent port was not proved, and the suggestion of the court that it would take judicial notice of the custom of carrying false papers, without making a distinction as to whether the false papers pointed to a neutral or a belligerent port, is objected to. The ground of the objection to such judicial notice, as well as to the act itself of clearing for a belligerent port, is that it "WOULD NECESSARILY *increase the risk.*" (Brief, p. 39, and p. 2.)

This is an inconsistent attitude for appellant, for his entire case is based upon the proposition that under the English law it is *immaterial* whether or no the use of false papers tend to *decrease* the risk. It must therefore be equally immaterial whether or no it tended to *increase* the risk. We think this is true. Whether it decreases or increases the risk, the only question is, whether or no it be within the implied permission flowing from the liberty to run blockade.

Again: In principle, what difference is there between giving a belligerent character to the enterprise by

papers giving a belligerent character to the cargo, and papers giving a belligerent port as the destination? Yet in LIVINGSTON v. MARYLAND INSURANCE Co. it was held that, under the law, certain papers "on board for the purpose of protection in one event, which, in another, might endanger the property"—in that case papers making the property belligerent property—is held to be *tacitly consented to by the insurers.* It would, therefore, *not* "increase the risk", but on the contrary, would be *the very risk insured.*

It will further not escape notice that the Supreme Court in the Livingstone case did not hold that custom to be unreasonable, as contended by appellant, but expressly approved of it. The court there said:

"But when the underwriters know, or, by the usage and course of the trade, ought to know, that certain papers ought to be found on board for the purpose or *protection in one event, which, in another, might endanger the property, they* tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property *in the Spanish ports,* and of the American papers, to prove the American character of the property *to other belligerents.*"

Speaking of that decision Mr. Duer said:

"The property in this case *was, in reality, American,* but the false papers gave it a Spanish character, for the purpose of protecting it in the ports of the Spanish Colony, *to which she was destined,* and *where a trade by Americans was prohibited.* As Spain and England, however, were at war, the false papers exposed the property to English capture, and it was from this cause that the loss arose."

This would seem to justify the refusal of the court to give appellant's proposed instruction, that

"A custom to carry papers showing the destination to be the port of one belligerent when in fact sailing to a port of another belligerent, when the vessel is likely to meet the cruisers of both nations on the voyage, is unreasonable, and the jury cannot regard the underwriters as charged with notice of it." (Brief, p. 39.)

In the same line as the Livingston case is the language of BUCK v. CHESAPEAKE INSURANCE CO., 1 Pet., 161, speaking of a cover of belligerent property under a neutral name, that

"No underwriter can be ignorant of the practice or the precautions ordinarily resorted to that the cover may escape detection.

* * * * * *

"Underwriters, with whom the extension of trade is always beneficial, must and do connive at the practice in silence."

It will be noticed that in BUCK v. INSURANCE CO. there is *no evidence of a custom,* but the court took judicial notice of the "precautions ordinarily resorted to that "the cover may escape detection", and the fact that "*the cloak must be thrown over the whole transaction.*"

The clearing for Moji was only such a "cloak" to cover her true destination.

So, DUER, as we have seen, excludes the necessity of proving an usage. He says, (Record, p. 307):

"It is, however, *certain,* from other cases in the English courts, and from numerous decisions in the United States, that where the carrying of false papers, in the voyage or trade to which the insurance relates, is a known or general usage, *or where such papers, from the*

very nature of the voyage, is indispensable, the law will impute to the insurer the knowledge of the fact and imply his assent to assume the risk."

The note of the text discloses that this dual disjunctive statement respecting usage *or* indispensability is Mr. Duer's interpretation of the two cases of Livingston v. Insurance Co. and Buck v. Insurance Co.; in which respect he agrees with our suggestion above.

We have not attempted to multiply instances of clearance for a belligerent port, because, as already said, we deem the distinction does not commend itself to the reason of the rule under which a false clearance is justified.

It will, however, not be overlooked that in Horneyer v. Lushington and in Oswell v. Vigne as well as in Livingston v. Ins. Co. the vessels were bound to belligerent ports, and the false papers were belligerent papers. So, also, in The Veteran, Takahashi on International Law, p. 717, we find the practice mentioned without limitation. "It has been common practice of " those who attempt to run blockade to prepare *several* " *kinds* of papers in order to escape capture." These are sources to which the court may look for the purpose of judicial notice, if the fact is otherwise not sufficiently within its knowledge.

The real *practice or custom* is, as said by the Supreme Court, to throw "a cloak over the whole transaction" and the details into which that "cloak" is arranged, is immaterial, so long as it is "for the purpose of protection", notwithstanding that in another event it "might endanger the property". That is the ultimate practice

or custom of which the court will take judicial notice, and the present act comes within those lines, as well as within the rule of indispensability.

The court does not take a case away from the jury when he instructs them upon a question of judicial notice. He simply instructs them upon the nature of the evidence of a fact, but as the evidence on this subject is uncontradicted, it was within the province of the court to instruct as to the fact, if it saw fit.

VI.

INSURABLE INTEREST.

We take exception to the attempt on the part of appellant to cast aspersions upon Mr. Robert Dollar with respect to this insurance, and particularly to the insinuation contained in the coupling of the alleged re-purchase of the vessel with the use of false papers. Appellant knows the question of the credibility of the witness is concluded by the verdict of the jury, but when (Brief, p. 3), he confesses that "it is not necessary to go into " this phase of the case, however much light it might " have thrown upon the motives of the company in de- " clining to pay the claim", he confesses his ulterior purpose. No man on the coast bears a fairer name than Robert Dollar, and to cast aspersions upon him because of an amendment of a complaint, to correct an error as to the date when a transfer was made, is not in keeping with the traditions which should control the conduct of

an officer of the court. It seems, therefore, that the gratuitous suggestion (Brief, p. 2) contained in the statement with the significant interrogation point, viz.: "The vessel carried full insurance. She was bought "back from the Japanese by Mr. Dollar, but whether "the price of re-purchase made the user of this extra- "ordinary device to evade (?) capture a profitable one, "the record does not show", is lugged into the argument in the hope of creating in the mind of the court a suspicion of fraud on the part of the assured. So also the paragraph on page 43, ending with the statement that "the stranger character of the false papers, are, to "say the least, suggestive".

"The motives of the company in declining to pay the "claim" will not bear investigation, in view of the fact that a hundred and fifty other insurers with as full knowledge of the subject as this company has, have paid their claims without question.

Neither is it true, as stated in the brief, that "it ap- "pears that the vessel was bought back from the Jap- "anese at her condemnation sale in the spring of 1905".

Whatever may be said of the testimony of Captain Cross, Mr. Robert Dollar is not the M. S. Dollar Steamship Company, and there is no evidence that the alleged purchase by him was made for or on behalf of that company. Inasmuch as the evidence upon the subject was on this ground ruled out in the lower court, without exception, we resent the attempt in this indirect way to reopen the matter on appeal.

With this introduction we consider next

THE INSURABLE INTEREST OF PLAINTIFF, AND THE CONTENTION THAT NO SUCH INTEREST IS PROVED AT THE TIME OF THE LOSS.

The nature of the insurable interest is not truly stated by the appellant.

The argument based upon the word "*is*" as it appears in the record, will not answer the purpose. The bill of sale which was introduced in evidence, Plaintiff's Exhibit 1, which the record says "is hereunto annexed", (p. 135), but which seems to have been overlooked in the printing thereof, bears a date anterior to the placing of this insurance. It shows the ownership to be in the British corporation, the M. S. Dollar Steamship Company, Limited, of British Columbia, concerning which ownership the verb in the present tense is used in the record. That would seem to connect the ownership at the time of effecting the insurance, with the ownership at the time of the loss.

Ownership proved at the time of the issuance of the policy is presumed to continue till the time of the loss. The policy bears date December 22, 1904. The seizure was made January 27, 1905, or 37 *days thereafter*. There is no evidence of any change of ownership in the interim. It cannot be said that 37 days is an unusual length of time for an unchanged ownership in a vessel to continue.

The rule is settled "that a thing once proved to exist " continues as long as is usual with things of that na- " ture". CLEAGE v. LAIDLEY, 149 Fed. 353-54; C. C. A.; CIVIL CODE OF CAL., Sec. 1963, subd. 32.

This principle has been applied in many cases to a continuance of title for even a much longer time. In KIDDER v. STEVENS, 60 Cal., 419, it was found that a conveyance of premises was made in 1875 to Mary Kidder. It was contended that this "is not a finding on the issue " of ownership on the first day of June, 1879", and the court said:

"The law presumes that the estate created by that deed continued until it was proven to have ceased, in the only way in which it can cease, by a conveyance or by descent cast."

It was further said:

"A presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it."

In HOHENSHELL v. SOUTH RIVERSIDE ETC. CO., 128 Cal. 631, it was objected that a finding of ownership of September 24, 1883, was not a finding of ownership on February 11, 1884, and the court said that the objection was obviously untenable; that ownership at the latter date is presumed, in the absence of anything appearing to the contrary. In FISCHER v. NEIL, 6. Fed. 91, it was said that a patent having been granted to the plaintiff, he is presumed to be still the owner of it. In the above case of CLEAGE v. LAIDLEY it was held that a state of insolvency existing in July, 1903, was presumed to continue to December of that year. In BRADSHAW v. ASHLEY, 180 U. S. 63, it was said with respect to possession of real property, that the presumption of ownership in fee arose from the fact of possession, which, under a color of right, is sufficient proof of title.

This would seem to be sufficient to prove ownership at the time of the loss.

It further appears in the record that the *real* owner of the steamer "M. S. Dollar" is the M. S. Dollar Steamship Co. a corporation existing under the laws of the State of California, the plaintiff in this case * * * The California corporation *furnished all the money for the purchase of the vessel* by the Arab Steamship Co. * * * (Record, p. 134), which corporation transferred the *legal title* to the M. S. Dollar Steamship Company, Limited, of British Columbia, as evidenced by the bill of sale above mentioned. (Record, p. 135.) The *beneficial* ownership was then in the plaintiff.

"At the time of the issuance of this policy of insurance, the steamship was operated by the San Francisco corporation, who took the profits, stood the expense, made all the contracts in the name of the M. S. Dollar Steamship Company, and *operated her as owner* under an arrangement whereby all the profits were to go to the California corporation, and the California corporation was to take entire management and control of the ship and the business." (Record, p. 135.)

So, also, Captain Cross testifies, (Record, p. 182):

"Q. Who *were* the owners of the 'M. S. Dollar'?
A. The M. S. Dollar Steamship Company."

All of the foregoing should be read in connection with the testimony quoted by appellant with his black emphasis on the words *is* and *have*.

Is that not sufficient to warrant the jury in finding that the beneficial owner of that vessel at the time of the

insurance *and at the time of the loss,* was in this plaintiff? If so, their finding upon the issue is conclusive.

What if it be true as stated, that the "agreed valua-" tion is merely that of the hull of the vessel, which at " this time belonged to the Columbia corporation"? (p. 43.) The beneficial ownership was in plaintiff.

But, if it only had the interest suggested by appellant, this is a valued policy, and as decided by this Court, the valuation is conclusive "in respect to all rights and " obligations which arise upon the policy of insurance". It is immaterial *what* interest the assured has, so long as he has "*some* interest at risk". Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co., 133 Fed. *646.*

If this were not enough, we could go further. The British Columbia corporation held the legal title. This insurance was "for account of concerned" and is recoverable in the name of the nominal insurers for the benefit of all concerned.

Hagan v. Insurance Co., 186 U. S. 430;
Rider v. Ocean Ins. Co., 20 Pick. *265, 266;*
2 Parsons on Marine Ins., 442.

"It is admitted on all hands that it is not necessary that the insured person have a legal interest, but that an equitable interest is sufficient. The title, whether legal or equitable, may be defective or even bad, provided the insured has possession and use; even a valid equitable title is not requisite. It is held sufficient that the

insured has a direct pecuniary interest in the preservation of the property, and that he will suffer a pecuniary loss as an immediate and proximate result of its destruction."

DAVIS v. PHOENIX INS. Co., 111 Cal. 414.

We respectfully submit that the judgment should be affirmed.

NATHAN H. FRANK,
Attorney for Defendant in Error.

FRANK & MANSFIELD,
Of Counsel.

No. 1753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE MARITIME INSURANCE COMPANY
(a corporation),
Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY
(a corporation),
Defendant in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

WILLIAM DENMAN,
Attorney for Plaintiff in Error.

Filed this.....day of December, 1909.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I.

The Many Risks Covered by the Policy.

To judge from the tone of the brief of defendant in error, the only loss covered by the policy sued on was by condemnation for carrying papers falsely describing Moji, the port of the capturing belligerent, as the destination of her cargo. The fact is, however, that the Maritime Insurance Company assumed liability (1) for capture during the actual running of the blockade; (2) for capture for running away from the Japanese cruisers, in attempting to reach the blockaded port; (3) for shipwreck on being driven on shore in an attempt to escape

capture; (4) for the costs of any deviation from her voyage reasonably undertaken to avoid enemy cruisers; (5) for injury to her hull from shots from the enemy; (6) for sinking from shots from the Japanese or from the Russians, if, for instance, they should mistake her for a Japanese vessel; (7) from loss from striking a mine either at the mouth of the harbor, or floating in the sea; (8) for detention while Japanese or Russians were searching the vessel or examining her papers; (9) for detention while being taken to a port for further examination; (10) for any costs involved in defending her in condemnation proceedings and procuring her release; and various other causes of loss.

The carriage of false papers violates no warranty and does not affect the liability for *other* losses covered by the policy; a loss from condemnation for carrying them is simply a loss not insured against (testimony Judge Hamilton, p. 259, Simey, p. 236, 237). The suggestion that the insurer must have contemplated that papers would be carried falsely describing the port of the opposing belligerent as the destination, *because there was no other loss to insure against,* or *because capture was inevitable without them* falls flat on any careful consideration of these many possible dangers which threatened the insured voyage,* whether or no false papers are carried.

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* The risks which the Dollar Company claimed were insured by the policy were those of "Capture, seizure, or detention, and the conse-" quences of any attempt thereat, and all other consequences of hostili-" ties" (Rec. p. 152). The suggestion of our opponent's brief that we are attempting to retain our premium is not only dehors the record, but not a fact. The premium was tendered by the writer of this brief to Mr Dollar's son (Rec. p. 146) after consultation with Mr. Frank's office. It is true that we are entitled to withhold it (Rec. pp. 222, 247), but we did not attempt to do so.

If it be true as Captain Dollar testified that Vladivostock was blockaded and mined, then the dangers of loss in attempting to run away from the cruisers or to cross the fields of mines and torpedoes were well worth the premium of 25% (less 5%, less 5% more if the dangers were successfully evaded), without including the risk of loss from false papers.

However, as we have shown in our opening brief, the English law is, that, *even if the capture must necessarily result* from a carriage of papers truly showing the voyage expressed in the policy, permission to use false papers will not be implied, and the underwriters are not liable if the decree of condemnation, as in this case (pp. 212-216), expressly rests on the use of false papers to evade capture. The above enumeration of risks insured against by the policy is merely to show that whatever "ungraciousness" may have existed in the English case cited, where the loss was bound to occur if false papers were not used, does not exist in the case at bar.

II.

The Contract Should Have Been Construed for the Jury Both in the Light of the English and the American Law.

Counsel for defendant in error seems at a loss to understand how we are concerned with the condition of the law of both England and America, and seems to have missed the point made at pages 33 and 34 of our opening brief.

In that brief we have contended that there was *no evidence* of an authority to C. T. Bowring & Co. Limited of London, much less to Bowring & Co., a separate company in San Francisco, or Mr. Comyn, the latter's manager, to act as the Maritime Company's agent in delivering the policy to the insured or arranging for that delivery. We also pointed out that even if we were not entitled to an instruction that the policy was delivered in England, in any event it was a question of fact *for the jury* to decide, i. e., whether an agency existed to deliver the policy *for the Maritime Insurance Co.* in San Francisco; or whether the policy, which is given in consideration of *"promising"* to pay the premium, became a contract as soon as it was delivered in London, to the English firm of Bowring & Co. Ltd. That the matter was open to the jury, was the position taken by both Judge Van Fleet and the plaintiff in the lower Court, and in his brief here.*

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* This is given more extended treatment at page 20 post.

As the jury might thus decide that the delivery was in either of the two jurisdictions, they should have been instructed as to the contract's construction under the laws of both. The trial Court could not tell whether the jury would decide that the policy was delivered in England or in San Francisco. Nor can this be determined by this Court. The defendant was entitled to have the contract construed in the light of both jurisdictions, for if it was delivered in England, it did not impose on the insurer a liability for condemnation for the use of false papers; whereas if the contract was controlled by the American law, the jury would have to award the insurance company the verdict, unless they found that the particular papers supplied the ship, were in customary use on voyages in the Russo-Japanese war and their use in this case did not tend to increase the risk of capture.

On the question whether the use of the false papers must be shown to be customary, or not to tend to increase the risk, we were entitled to an instruction as to the law of this country whether the policy be delivered here or in England, for the law of America must be presumed the law of both places if the cases of Horneyer v. Lushington et al. do not establish a severer rule.

The jury may have decided that the contract was executed in England but, being uninstructed by the Court, erroneously construed it in the light of the law of England as expressed in the earlier and not the later cases, and decided against us on that ground. There is nothing in the verdict to show their course of reasoning, and the fact that they were left to decide the matter without the instructions requested by the defendant must be deemed to have prejudiced its case and hence warrant a reversal.

III.

Whether the Jury Should Have Decided That the Policy Was Executed in America or in England, the Court Should Have Instructed Them That the Insurance Company Was Not Liable if the Particular Kind of False Papers Used on the Voyage (a) Tended to Increase the Risk and (b) Were Not Warranted by a Custom Established in the Russian Trade.

The American law (and the law of England is presumed the same if the severer rule we claim, does not prevail), as to the liability of the underwriters for condemnation for the carriage of false papers, has been laid down in the case of Livingston v. Maryland Insurance Company, 7 Cranch 506. In that case Chief Justice Marshall in delivering the opinion of the Court grants a new trial, because the Court below failed to give the following instructions:

> " 'If the jury should be of opinion that the Spanish *papers mentioned in the case,* were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact that they would be on board would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that *it was the regular usage of the trade to take such papers on board*, that they would not vitiate the policy.' The instruction of the Circuit Court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact to which this court attached

much importance. It is the unanimous opinion of this court, that in giving this instruction the Circuit Court erred."

Livingston v. Maryland Ins. Co., 7 Cranch 537.

Mr. Duer, in that portion of his book read in evidence by Mr. Frank, on page 309 of the Record, speaking of the above case says "the opinion of the Court was that "*if the jury believed,* from the evidence, that the use of "false papers *was necessary,* or justified by the *usage* "*of the trade,* there was no concealment that could "affect the right of the plaintiff to recover". Duer also cites Calbreath v. Gracey, Federal Cases 2296, where Justice Washington holds that it is a question *for the jury to determine* whether or not the methods *actually used* to deceive the enemy are justified *by the course of the trade.*

Calbreath v. Gracey, 1 Wash. (C. C.) 192.

Such being the American law Judge Van Fleet clearly erred when he gave the following instruction and the other instructions considered in chapter 3 of our opening brief:

"There is evidence that it is common practice of blockade runners to carry false papers, and such evidence accords with the common knowledge upon the subject of which this court will take judicial notice.

"It is also in evidence that under the law of England 'every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself', and further 'that what is usually done by such a ship on such a cargo, in such a

voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed'.

"If, therefore, you shall find that the permission to run blockade carries with it by implication a permission to use false or simulated papers, *then I instruct you that the carriage and use by the plaintiff of* FALSE PAPERS ON THE VOYAGE IN QUESTION *does not affect its right to recover, and that the defendant is liable notwithstanding the use of such false papers.*"

(Record 348, 14th assignment of error, p. 380.)*

The only evidence before the jury regarding the custom, was that in some other wars, blockade runners had carried false papers to *neutral ports* (testimony Hengstler, 170, 171; Admiral Kempf, p. 166).

This instruction is clearly not in accord with the rule laid down in the approved instruction in Livingston v. Maryland Insurance Company. The fact that it was a "common practice of blockade runners to carry false "papers" in prior wars, in other oceans, and under conditions of commerce of many decades ago, does not take from the jury the right to determine whether "it was "the regular usage of this trade to take on board the "papers *mentioned in this case*". It may very well have been the custom of blockade runners to carry false papers to neutral ports in other wars, before the universal use of the submarine cable, wireless telegraph, fast steaming vessels of war, the electric searchlight, and all the other means which now make the apprehen-

* Our opponent discusses this instruction in its brief as if it were attempting to describe the law of England. In either case it is erroneous.

sion of the blockade runner so much easier and the falsity of his statements as to his movements and destination so much more certain of exposure. But this does not warrant the Court in saying to the jury that if they find from those facts that the "permission to run block- " ade carries with it by implication a permission to use " false or simulated papers", they must also find "car- " riage and use by the plaintiff of *false papers on the* " *voyage in question* does not affect its right to re- " cover", and that the "defendant is liable notwith- " standing the use of such false papers".

The question for the jury always is, are the papers " mentioned in the case" warranted by the "regular usage of the trade", or in Judge Van Fleet's own language, are they such papers as are warranted on "such " a ship with such a cargo in such a voyage".

As we remarked in treating this branch of the case in our opening brief, the Circuit Court was not entitled to say to the jury that *any* false papers were licensed by the insurer just because they are *false;* and the jury could have inferred in this case that it was stupidly negligent to have taken out the papers falsely describing the destination of Moji, Japan, the port of the opposing belligerent. Counsel's argument that they must have chosen a Japanese port because there was no convenient Russian port, is palpably weak. As he himself points out, the dangerous place on the voyage was the passage of Tsugaru Straits. This strait is on the opening of the Sea of Japan, the regular route of travel on voyages from the American ports

to Shanghai, Tien Tsin, Hong Kong and other cities on the China coast. These were neutral ports and it might well be said that it was a disarming circumstance to have a cargo such as was on board the "M. S. Dollar" covered by papers to such a neutral destination. True, if the vessel continued on a westerly course, after she had passed through Tsugaru Straits, the sham would be discovered, whether the papers were to Moji or to a Chinese port, but, if she was captured in the strait, such neutral papers would have at least had *some* measure of plausibility.

Granting again that the testimony of the use of false papers to *neutral* ports in other wars was applicable to this voyage, it was for the jury to determine whether or not the papers to Moji, the port of the opposing belligerent, was in fact equivalent to the carrying of papers to a neutral port. They may well have found that the taking out of such papers at the port of San Francisco, in which the master swore that it was his intention to "land the cargo" at Moji (Rec., p. 219), increased the risk of capture by suggesting to the Japanese authorities to examine into the arrangements for the receipt of such a cargo.

Our opponent answers this argument by suggesting that the clearance for Moji may have been for the purpose of having the Dollar wait there for orders as to the place of delivery. This ignores entirely her captain's oath that he intended to land his cargo there.

Many other reasons might have occurred to the jury's mind which would have led them to hold that the papers

actually taken out were not equivalent to the papers described as customary in these other wars.

In our opening brief we showed that the jury might have concluded that the carrying of the *two* sets of papers exposed the vessel to Russian capture, as Russian cruisers might overhaul the vessel, and she be condemned on the ground that the Moji papers were the true ones.

Our opponent's answer to this is, that the *cargo* was consigned to the "Russian military authorities". *The testimony does not support this contention.* Captain Cross was to report to the commander of the port, just as here a captain must report to the Customs officers, but he expressly states he does not know whether or not the person designated was not a mere merchant (record, p. 205). It will not do to assert that the *cargo* of a vessel is consigned to the "Russian military authorities", because the captain is instructed to report on the arrival of his vessel to a person who may or may not be a mere merchant.

That the vessel was likely to meet Russian as well as Japanese cruisers is apparent from the following testimony of Cross, her captain, and Captain Dollar, her owner,

> "Q. You knew that both the Japanese and Russian cruisers were likely to be in the course you were to sail on, didn't you?
>
> Captain Cross. A. Exactly, I did."
>
> (Record, p. 184.)
>
> "Mr. Dollar, continuing, and in response to the questions asked by Mr. Denman, for the defendant,

testified as follows: The vessel was captured at Tsugar Straits. I instructed him to go through La Perrouse Straits if it were possible. War was then being waged between Japan and Russia.

Mr. DENMAN, continuing, said:

Q. And naval engagements were likely to occur between the two?

A. Yes, but I didn't see that.

Q. You didn't see them, but that's the fact, isn't it?

A. Yes.

Q. And the Japanese and Russian cruisers covered this country between Japan and Russia; that is a fact, is it not?

A. Yes."

(Record, p. 145.)

It was *for the jury* to determine whether or not the papers to Moji exposed her to a risk of condemnation by the Russians on the ground that the Moji papers were the true ones and the Vladivostock papers were false, and that she was evading Russian capture by carriage of the latter. The jury may well have found that there was a custom to carry false papers to a neutral destination but the "Dollar" had not brought herself within the custom, and that the Moji papers exposed her to a *double* risk of condemnation instead of protecting her from any.

The jury may well have held that it would increase the risk to take *any papers at all* on this voyage, in view of the conditions so aptly described in our opponent's brief:

> "The vigilance of the Japanese authorities on the Pacific Coast, in apprising themselves of the true destination of cargoes proceeding from here to the Orient, was as keen and well recognized as were any of their military precautions so remarkably exemplified in the war. In England, which country was her ally, the fact of the *insurance* of this cargo for *Vladivostock* could not be concealed. Hence, they were on the lookout for the 'Dollar', not because of her clearance for Moji, but in spite of it."

The jury may well have held, if the Court had not taken the question from them, that the reason why the plaintiff failed to offer *any testimony* as to the custom of carrying false papers in the *Russo-Japanese war,* was because there had been no such custom established on account of the very conditions above described. They may well have held the success of the voyage to Vladivostock depended upon the skill and luck of the blockade runner in *entirely eluding* the Russian cruisers, that this constituted the *only* chance of a successful voyage, and that the use of any papers, whether to neutral or belligerent port, would tend to increase the risk of condemnation. As we have shown, if the "Dollar" had presented her true papers to the Japanese and not attempted the hopeless task of deceiving them, the vessel could not have been condemned and the owners of the cargo would have been the only losers.

> Testimony of Louis Hengstler, pages 170, 171;
> "Rigende Jacobs", 1 C. Robinson, page 91.

The jury might well have held that the owner of the vessel owned no duty to the cargo to undertake a hopeless measure for its protection, and that it did owe the

hull underwriters the duty not to expose the ship needlessly.*

In view of all these inferences which the jury could have drawn from the evidence and from which they could have decided that the Moji papers were not customary papers, we submit that it was reversible error to take the question from them.

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* And in connection with determining whether the use of such papers was careless or reckless, the jury had a right to take into consideration the repurchase of the vessel by the president of the company (p. 181), his sending Captain Cross to clear for Moji, Japan (pp. 140, 200), that is procuring him to swear falsely to the officers of his own government, in his account of his cargo, that he intended to land it at Moji, when he had no such intent (U. S. Revised Statutes, Sec. 4200; Rec., p. 219). And as further showing recklessness, the jury could also consider the fact that the plaintiff's president first swore that the boat was owned by one company (p. 45) and then later that it was owned by an entirely different one (p. 79). These things might properly have been taken into account by the jury, but we were unable to have them considered under the Court's instruction that the jury **must find** that the papers were those customarily used on the voyage in question.

Counsel expresses surprise that we should dare notice such testimony about a gentleman of his client's good repute dehors the record. We certainly never should have been able to do so **had not the above facts been brought out by the gentleman's own attorney.** We believe them relevant and it is the gentleman's misfortune if his counsel has not protected him from misrepresentation.

IV.

The Cases of Horneyer v. Lushington and Oswell v. Vigne Are the Law of England Today.

Our opponent admits that there are no cases in point subsequent to the two decisions of the King's Bench on insurances against capture in the so-called Napoleonic Wars. He insists, however, that they are controlled by Lord Mansfield's decision in 1757, in the case of Pelly v. the Insurance Co., and in Planche v. Fletcher, twelve years later; and that Judge Hamilton's* testimony and that of Mr. Simey to the effect that the two later decisions of Lord Ellenborough's time are still the law, is attributable to their desire to earn their fee.

To sustain his contention that the two earlier cases control the two later, counsel advances an interesting and novel proposition. It is that the decision of the United States Supreme Court in Buck v. the Chesapeake Insurance Co. (1 Peters 151), which holds that the rule laid down in the Pelly case in 1757 was the law in the United States in 1828, is evidence that the cases in England, subsequent to the Pelly case, laying down a different rule, do not declare the law of England. The proposition seems to be that a recognition of the rule of an earlier King's Bench decision by an American Court overrules a *later* decision of the King's Bench which does not agree with the first, and further, that Lord Ellenborough's later decisions can be thus overruled by an American Court although that Court does not do him the courtesy to mention them.

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* Mr. Hamilton has been appointed to the High Court of Justice since his deposition was taken.

One simple explanation for our opponent's extraordinary argument is that it fails to recognize that Lord Mansfield's decision in 1757, while the American Colonies were still a part of England, was in a certain sense binding on our Supreme Court as the declaration of its immediate predecessor. Questions of commercial law are presumed to have a continuous history through the American Courts to their commencement and thence back through the Courts of England. In declaring the *American* law in 1828, the Supreme Court properly invoked a rule laid down by Lord Mansfield in 1757 and disregarded Lord Ellenborough's decisions rendered many years after the establishment of our independence.

We will not attempt to reply to our opponent's suggestion that a King's Counsel and a present member of the English Bench would color his testimony for a fee. If this be so, why did he not obtain other testimony to rebut theirs? Or does he contend that all the English Judges and authors are unreliable and only his experts, Professor Hengstler, Admiral Kempf and the various insurance men are entitled to credence?

It is argued that the testimony of Simey and Hamilton does not apply to this case because the "facts rep-" resenting the nature of the voyage are nowhere in-" cluded in the hypothetical questions upon which the " answers of these gentlemen are based". This argument rests on the supposition that these gentlemen gave their opinion *on the policy without having read the clause permitting the vessel to run blockade.*

In the arguments on demurrers to the various complaints, it was at one time urged that it made a difference in the construction of the policy whether the words in the portions stricken out (record, p. 368) were considered or ignored. As a result of this dispute, a copy of the policy from which the words stricken out were omitted, and a copy of the policy with the deleted portions appearing were attached to the interrogatories. These are the two exhibits "A" and "B" (record, pp. 269, 272), upon *each* of which the opinion of the experts was asked. This required a comparison of the two documents to determine wherein they differed. The policies are in the conventional English form, the particulars of the voyage insured being inserted at the usual places and taking less than ten lines. Is it conceivable that in the comparison of the two forms these experts failed to find the words "with liberty to run blockade" standing as they do in a strikingly short *paragraph of but five words?* (pp. 267, 273).

Our direct interrogatory asked these men for a construction of the policy in both forms. Their answer gives their construction. If counsel was of the opinion that they would miss this conspicuous and important paragraph it was his duty to address cross interrogations to them to expose their oversight.

The interrogatories were framed on the facts as to the condemnation as found by the prize decree of the Yokosuka Prize Court (record, p. 212), to which this Court is confined in determining the cause of the loss.

Croudson v. Leonard, 4 Cranch 434;
Arnould, Sec. 729.

That the decree committed no injustice appears from the testimony of the M. S. Dollar's commander, C. W. Cross (record, pp. 188, 196, 197).

The interrogatories and answers are as follows:

"Q. Suppose the 'M. S. Dollar' were sent to sea under a policy of which exhibit 'A' hereunto annexed, is a copy, carrying a cargo in fact consigned to Vladivostock, a set of bills of lading for the cargo, with destination given as Vladivostock, and a set of similar bills of lading for said cargo giving as its destination Moji, Japan, a clearance for Moji, Japan, as the vessel's destination, whereas her destination and the destination of her cargo was Vladivostock, Russia; suppose that the vessel were captured by the Japanese then at war with Russia, that the captain of the 'M. S. Dollar' presented to the captain of the Japanese man-of-war the false set of papers to Moji and did not present the true set of papers to Vladivostock, that the latter captain discovered the true destination of the vessel and cargo and that the vessel was subsequently condemned for carriage of such false papers with intent to evade capture; that there was no leave given to carry such false papers; what was the law of Great Britain between December 1, 1904, and May 1, 1905, with reference to the liability of an insurer under such a policy for such a capture and condemnation?

"A. Mr. Hamilton. The insurer is not liable. My authorities are Horneyer v. Lushington, reported in 15 East, page 46, and Oswell v. Vigne, reported in 15 East, page 70, decisions of Lord Ellenborough, never overruled or questioned in any decided case, and therefore binding authorities as the law at present stands.

"A. Mr. Simey. It was stated by Arnould himself (2nd Edition, pp. 733, 734, reproduced in 7th Edition, paragraph 732) that, though it became necessary during the great French Wars to carry on trade with the Continent by the aid of simulated

papers, 'yet our Courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ships carrying simulated papers, were conclusive to discharge the underwriters from his liability except where there was an express leave given in the policy to carry them'. Arnould gives as illustrations the cases of Horneyer v. Lushington, 15 East, 46, and Oswell v. Vigne, 15 East, 70, which fully bear out his statement. This view is borne out by Marshall on Insurance, 4th Edition, 137, Park 8th Edition, page 729, and Duer, Vol. 1, page 744, and has never been questioned in any reported case. My answer to this question is therefore that the insurer is not liable (record, p. 227).

"Q. What would your answer to the last question be in the event that the vessel sailed with a complete set of ship's papers giving as her destination Moji, Japan, and a complete set also giving her destination as Vladivostock, Russia, that the first set was to be presented in the event the vessel were overhauled by the Japanese and the second was to be presented if captured by the Russians, and that she was captured and condemned by the Japanese for having carried and used the first set to evade capture?

"A. The same.

"Q. What would your answers to the last two questions be in the event it were also shown that it was notorious that the trade in which the vessel was engaged could not be carried on without such papers and that it was the custom of such trade to carry such papers?

"A. The same.

"Q. What would your answer to the last three questions be in the event that the policy were cast in the form of Exhibit 'B' hereto annexed?

"A. The same.

"Q. Suppose the 'M. S. Dollar' were captured and condemned by the Japanese for carrying and

using false papers to evade capture on the voyage insured against in the policy of which Exhibit 'A' is a copy, and it were shown that the fact of having such papers on board actually tended to decrease the risk of such loss: What was the law of Great Britain between December 1, 1904, and May 1, 1905, as to the liability of such insurer for such loss?

"A. The same.

"Q. What would your answer to the last question be if the policy were cast in the form of Exhibit 'B' hereunto annexed?

"A. The same."

Our opponent lays great stress on certain extracts from Mr. Duer's work on Marine Insurance. He ignores entirely the fact that Duer is writing of the law as it was in America. His book was dedicated to the "Founder " of the American School of Commercial and Maritime " Law", and was published in New York. In the text of his work he describes the decisions of English Courts as "foreign authority" and he particularly limits the extent to which these decisions are to affect what he calls "our own Courts" in the following language:

"SEC. 21. It remains only to add, that the decisions of the Supreme Court of the United States on all questions of international law, even where they differ from the opinions of jurists, or the adjudications of the English admiralty, must be followed and obeyed, not only by the inferior courts of the United States, but by all the courts of the respective states of the Union. So long as they remain unchanged by the tribunal that pronounced them, they are conclusive evidence of the law of nations, as understood and maintained by *our own* government. We have seen, however, that this necessity for disregarding foreign authority rarely occurs, since there is scarcely a decision in the

courts of Westminster, on any general question of public law, that has not been expressly, or by a necessary implication, approved and sanctioned by *our* national courts. On questions that have not yet been decided in *our own* courts, the decisions of the English admiralty are certainly to be regarded as presumptive, although not conclusive evidence, of the existing law, that both countries equally recognize, and are bound to follow."

(Record, p. 325.)

It is true that Mr. Duer prefers the rule laid down by Lord Mansfield in Pelly v. Royal Exchange (1757) and in Planche v. Fletcher (1779) to the later rule laid down by Lord Ellenborough in 1812, in Horneyer v. Lushington and Oswell v. Vigne. It is true that he believes that our Supreme Court has adopted the earlier English rule. *It is not true, however, that he believed that the rule of Oswell v. Vigne was not the law of England at the time he wrote his book in 1845,* as is apparent from the following language which concludes the section cited by our opponent to show Mr. Duer's opinion on this very case:

"It seems, therefore, a very just observation of Benecke, on the decision of the King's Bench, in Oswell v. Vigne, that as it was known to the insurer when the policy was effected, that the vessel insured would be liable to seizure in the continental port of destination, unless by false papers, the fact of her having sailed from England, could be concealed, his consent to the use of such papers, ought to have been implied. They were rendered necessary by the nature of the voyage and it was for the benefit of the insurer that they should be used. *It may be regarded as certain, that in the United States, such would have been the decision.*"

(Record, p. 310.)

In concluding this portion of the case, we submit that Oswell v. Vigne and Horneyer v. Lushington, as the latest decided cases of the Court of King's Bench, must be taken as the law of England of today, and that the testimony of the English Counsel is not overborne by showing a subsequent decision of the United States Supreme Court which does not mention the two cases, nor by expressions in Mr. Duer's treatise on the law of insurance in America as shown by decisions by "our own" and "foreign" tribunals.

And we further submit that these two decisions incontrovertibly establish the law of England to be that the right to use false papers must be expressly given and that it cannot be implied from the description of the voyage even where without the false papers the pursuit of the voyage so described would make the loss inevitable.

V.

The Duty of the Court to Construe the Contract Under the Law of England.

Our opponent contends that the Court should confine itself to the decisions of the Courts of King's Bench, in determining the law of England. He says at pages 9 and 10 of his brief:

> "The testimony of the two lawyers in question can be of no greater value than are the decisions upon which it is based.
>
> * * * * * * *
>
> "This court is, therefore, as well able to draw a correct conclusion *from the decisions,* as to what the law of England upon the subject under consideration was at that time, as were the two lawyers in question."

If our opponent's contention be true, then under the rule of the majority of the States and all the federal decisions, the Court below should have given the requested instructions, construing the policy in the light of those decisions. The construction of the contract as controlled by the English law is properly stated in our requested instructions Nos. 3, 4, 5, 6 and 7.

Counsel seems of the impression that the Court is to construe the law for the jury as distinguished in some way from *construing the contract* in the light of the law. As we have pointed out, construing a contract is nothing more or less than telling the jury what force and validity the law gives it. In no case can a Court construe a contract without stating what the law is. We contend

that the construction of the contract must be given where the law, as here, is before the Court for that purpose.

In our opening brief we cited a large number of cases maintaining this position. Counsel passes these by and refers the Court generally to the cases alleged to be collected by the various text writers, without mentioning one contrary decision. If he seriously contends that there is a single case in opposition to those cited by us buried in the mass collected, it is unfair to both the Court and ourselves not to designate it.

We are unable to follow counsel's consideration of the case of Mexican National Ry. v. Slater. His conjectures as to what "may" have happened in the trial of that case are of no weight when we consider the *ratio decidendi* of the decision.

That case goes far beyond anything claimed here. We are not asking the Court to take judicial notice of anything. Our point is that the evidence *being before the lower Court,* it "was addressed to the judge to aid him " in his rulings during the progress of the trial, and in " giving his instructions to the jury". Certainly, if in any case instructions should be governed by the foreign law as proved, they should be so governed in construing this insurance policy.

The case of Mexican National Ry. v. Slater went to the Supreme Court, where the Circuit Court of Appeals was sustained. No suggestion was made by the upper tribunal that the rule laid down as to instructing the jury of the law, was improper and, on the contrary, it

goes into an elaborate analysis of the testimony, not on the theory that the jury might or might not find the law to be in a certain condition, but that the Court had the power to determine that for itself.

Slater v. Mexican National Ry., 194 U. S. 120.

The case of Mexican Central Railroad v. Sprague also involved the construction of Mexican laws proved partly by statutes and *partly by the testimony of experts. The lower Court took the case from the jury and instructed a verdict for the ground that defendant was liable under the Mexican laws.* The upper Court, after construing the law, sustained the verdict.

Mexican Central Ry. v. Sprague, 114 Fed. 544.

The procedure in that case is exactly the procedure we claim should have been followed here. At any rate, if in taking the entire case from the jury, the Court construed the facts in the light of the law of Mexico, as proved, the Court here should have construed the contract in the light of the English law and so instructed the jury.

The opinion in Hanley v. Donoghue, 116 U. S. 7, has no application to this case. We do not for a moment contend that the Circuit Court should have taken "judicial notice" of the English law, or that it should not be proved, but simply that, with the evidence before it, the Court should construe a contract in its light, and that the testimony is *addressed to the Court* for this purpose.

We contend that it is absurd that a Court trained in interpretation of the law should leave to the jury the construction of a contract requiring a determination of the laws of a foreign country. It is patent that such a rule would lead to absurd results. The Court below was putting it mildly when it said that the question was "more or less blind to a jury".

Counsel says that our criticism is an indictment of the jury system and suggests that the jury has other problems to decide as intricate as questions of law. This may be so, but on these other questions the jury is theoretically as well equipped as the judge, whereas on questions of law the judge is a governmental officer whose primary function is their determination. The rule laid down by Story, Greenleaf and Wigmore and the Circuit Court of Appeals in the two Mexican Railway cases is based on plain common sense. It should be so laid down here, we submit, even if it were an entirely new question.

VI.

On the Evidence the Jury Could Rationally Have Inferred That the Policy Was Delivered to the Dollar Company in London.

At page 30 of our opening brief, we have argued that the evidence of Comyn, as to an agreement that the policy was to be delivered at San Francisco, should have been stricken out on the ground that it was not shown that he had any authority to bind the Maritime Insurance Company. Our opponent raises certain technical objections to the sufficiency of the motions to strike out. The basis of the motion, at page 166 of the record, XIV assignment, was that the evidence was inter alia "incompetent". It is entirely apparent from the colloquy between the Court witness and the counsel, extending from the beginning to the end of the cross-examination, that the incompetency was due to a failure to show any authorization from the *Maritime Insurance Company* to bind them to an agreement for a deferred delivery of the policy. The testimony was "irrelevant" for the same reason, and likewise "immaterial". While it is true that where the ground of the objection is not patent from the context this form is not effective, nevertheless it is submitted that where, as here, the purpose of the cross-examination must be clear to the trial Court, and the motion to strike out is based on that cross-examination and could point to nothing else but Comyn's want of authority to act for the Maritime, all the requirements of definiteness in the motion are complied with.

This form of objection was held good by the Supreme Court of the State of California in

> Roche v. Llewellyn Iron Works, 140 Cal. 563, at 577.

Except as otherwise provided by Act of Congress, the State laws in relation to the admissibility of evidence shall be the rule of decision in the Circuit Court in actions at law.

> Circuit Court Rule 43.

Even if remaining before the jury, Comyn's testimony becomes a matter for review here, under the XXXIX assignment of error (p. 389, 361), i. e., the refusal of our requested instruction No. XVII, as follows:

> "The evidence conclusively shows that the policy here in question was delivered to the plaintiff in England."

If the evidence could have been stricken out because Comyn was not shown to have any authority to bind the Insurance Company, then the fact that what he says is in the record does not make it any the more binding. And as his is the only evidence as to any transactions in San Francisco affecting the policy, we are entitled to the requested instruction that the policy was delivered in England. The refusal to give such an instruction, where the fact was conclusively shown is, we contend, reversible error.

However, the exclusion of Comyn's testimony becomes a mere moot question as far as this appeal is concerned because even with it before the jury, it is still for them

to determine whether the policy was in fact delivered in America or in England.

That this was the contention of the Dollar Company in the Court below is apparent from its requested instructions on pages 347 and 348 of the record. It was the position taken by Judge Van Fleet when he instructed the jury that they should determine whether or not Mr. Comyn was the Maritime's agent (p. 351), in the following language:

> "The jury are to disregard any evidence that the policy was delivered in San Francisco to Captain Dollar, or any agent of the plaintiff, unless it appear that the person so delivering it was the agent of the defendant for that purpose.
>
> "In that regard, gentlemen of the jury, as has been aptly stated to you by one of the counsel, the same individual may be the agent of both parties in a transaction of that kind; the same individual may be the agent to procure insurance for the insured and he may be the agent for the insurer for the delivery of the policy and the collection of the premium; and it will be for you to determine under the circumstances of this case as they may have been disclosed to you what the fact was in that regard here."

And it is the position taken by our opponent in his brief in this Court when he says, speaking of the above instruction (the capitals are his):

> "THE INSTRUCTION ABOVE QUOTED, WAS, UNDER THE EVIDENCE AND THE LAW AS FIXED BY THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, PERFECTLY PROPER."
>
> * * * * * * *
>
> "The law having thus fixed upon Bowring & Co. this dual agency, *it only remained for the jury to*

determine in what particular the broker was the representative of the one or the other of the parties —to distinguish those acts of the broker which were in furtherance of the agency of the assured from those acts which were in furtherance of its agency of the insurance company."

Brief for Defendant in Error, pp. 30 and 31.

The following is a summary of the testimony from which the jury might have inferred that the policy was delivered to the Dollar Company in London:

"Q. Mr. FRANK. You received that, did you, Mr. Dollar? That is the policy you received?

Ans. Yes, sir.

The COURT.—From whom?

Ans. We got it from *our agents* Bowring & Co.

Q. Who by?

Ans. By Bowring & Co., *our agents—our London agents.*

The COURT.—Mr. Dollar is this the only policy of insurance you have ever received evidencing the insurance of this ship?

Ans. That is the only policy, your Honor, and that policy never left our safe until after the ship had been seized, when I endorsed it on the back there, endorsed it and sent it to *our London agents* for collection" (Rec., p. 136).

* * * * * * *

"Ans. Subsequently I went personally to London, and interviewed the *agents there of the Maritime Insurance Company.* The *agent of Bowring & Company,* Mr. Hargreaves *went with me.* He took the policy along. I asked *the agents* if they were prepared to pay. I understood from him previous to going there that they had refused, and he thought it would be better for me to go and see them myself" (Rec., p. 140).

* * * * * * *

"Q. From whom did you receive it?

A. I got it from the agents, Bowring & Co.

Q. They were *your agents* in placing insurance, were they not?

A. Yes, sir.

Q. And it was the fact that you had received this document from Bowring & Co., that you testified it had been executed in London?

A. London is marked on it there.

Mr. Dollar.—(Continuing.) I did not see it executed. I was not there in London when it was executed. I was in San Francisco when it was executed. I do not know the name of the person who signed it. I have seen his signature before, but I could not identify it" (Rec., pp. 143, 144).

"Q. All negotiations as far as you know, with the Maritime were conducted in London, were they not?

Mr. Comyn. A. Yes, sir" (p. 162).

* * * * * * *

"Mr. Denman. Q. As I understand it, the negotiations, all of them, with the Maritime Insurance Company were had through your agents in London?

A. Through Bowring & Co. in London. They were the only people who negotiated, so far as I know, with the Maritime" (p. 163).

* * * * * * *

"Q. Do you know when the policy was delivered to your people in London?

A. No, I could not tell you the date that they received it. They sent it with others out to me.

Q. And your province in that matter then was to procure from the Maritime Insurance Company this insurance for Mr. Dollar; that is correct, is it?

A. That is correct.

Q. And the only transaction you know of, *with the Maritime Insurance Company* was had in London, and you were not present at any of those transactions?

A. No, sir" (p. 164).

From this testimony alone, it is apparent that the jury could rationally infer that the policy was delivered

to the M. S. Dollar S. S. Company in London. Even if the Bowring & Co., of London were English insurance "*brokers*" (which they are nowhere called or shown to have been), the transactions between them and the Dollar Company are explainable as consistent with a delivery in London when we consider the custom of English insurance companies to impose a primary liability on the agent for the premium, and the custom of the broker to hold the policy by the virtue of a lien for his premium.

Arnould describes the customary procedure in part as follows:

> "Sec. 103. The broker having effected the policy, usually retains it in his possession. He may do so either as a matter of right in exercise of his lien for premiums, or as a matter of convenience."
>
> "Sec. 106. By virtue of a custom which had existed for more than a hundred years, it became established law that the assured could not be sued by the underwriter for premiums, nor could the latter set off unpaid premiums in an action brought by the assured on the policy for losses.
>
> "According to the ordinary course of trade between the assured, the broker and the underwriter, the assured does not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, who is a middleman between the assured and the underwriter. But he is *not merely an agent;* he is a *principal to receive the money* from the assured, and to pay it to the underwriters."
>
> Arnould, Marine Insurance, Secs. 103, 106.

These English customs have been recognized by our Courts, and our own distinguished from them.

> Mannheim Ins. Co. v. Holander, 112 Fed. 549 at 552.

It is not contended that the above excerpts from Arnould are to be deemed in evidence before the jury, but merely that they show that our hypothesis that Bowring & Co. were not agents of the Maritime is consistent with reasonable business methods.

The jury could reasonably infer when Mr. Comyn testified that "there was no arrangement made here in " regard *to the payment to the Maritime* that I know " of" (p. 165) that he meant just what he said and that the arrangements here were between him personally, as one who had already bound himself to pay the premium, and the Dollar Company, who wanted to obtain its policy from him. The jury could reasonably infer, when Mr. Comyn said "It was a very big premium and *we* wanted " to know where the money was going to come from" (p. 165) that he meant exactly what he said, and that the *"we"* was Comyn & Co. as persons primarily liable for the premiums.

It is for the jury to infer for whom the acts done in San Francisco by Mr. Comyn were performed, and they are as much entitled to infer that they were done by Bowring & Co. for Bowring & Co., or for the plaintiff, as that they were done by Bowring & Co. as agents of the Maritime Insurance Company. When we take Comyn's testimony *in connection with Captain Dollar's,* to the effect that the policy was *"executed"* in London (p. 144), and

that he regarded the agents of the Maritime Insurance Company as persons distinct from Bowring & Co. (p.140), the right of the jury to infer that the contract was in *fact* "executed" in London becomes clear beyond any question.

As we have pointed out, if they came to this conclusion they were unaided by any instructions from the Court construing the contract in the light of the law of England, as shown from the evidence. The refusal to give such instructions we believe error.

VII.

The Decision in Hooper v. the State of California Does Not Hold That EVERY PERSON WHO OBTAINS INSURANCE FOR ANOTHER is the Agent of the Insurance Company for the Delivery of the Policy, but Merely That a BROKER Exercises Such a Function.

In this case there is not an iota of testimony to show that Bowring & Co. are insurance brokers, or that they ever engaged in any insurance transaction other than effecting insurance for this one vessel. Neither Captain Dollar nor Mr. Comyn speaks of the company as "brokers" and the careful use at all times of the word "agent", "*our* London agents" etc., would seem to indicate mere agency as distinguished from brokerage.

In this condition of the record, we are unable to see how the case of Hooper v. the State of California is of any assistance. In that case, a broker is distinguished from an ordinary agent as follows:

> "The admission that the insurance was procured for the resident from a foreign company which had no agent in the state does not exclude the possibility of its having been procured within the state. If it were obtained for the resident *by a broker* who was himself a resident, this would be a procuring within the state, and be covered by the statute." * * *
>
> "Domat thus defines his functions: 'The engagement of *a broker* is like to that of a proxy, a factor, or *other agent, but with this difference:* that the broker, being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself." * * *
>
> Hooper v. People, 155 U. S. 648, at 657.

In the agreed statement of facts, in the trial below, it was admitted that Johnson and Higgins were *insurance*

brokers customarily engaged in that business, with an office in San Francisco, and that the accused Hooper was their manager. This admission that he was a *broker* settled the question as to the distribution of his functions between the insured and the insurer.

The plain reasoning of the case is that if Johnson and Higgins had in fact been mere agents of the insured for a single transaction, and not general insurance brokers, the contract would have been executed when it was delivered to them in New York, and hence no offense committed in California.

And so here, there being no evidence at all that Bowring and Co. were general insurance brokers, it will not do to dub them with that name and then argue *from the name* that they had exercised the *functions* of that status. This is a course of reasoning viciously circuitous.

The most that can be said of the evidence of Comyn is that the jury *might* have inferred therefrom that Bowring & Co. delivered the policy in question in San Francisco, as agents for the Maritime Insurance Co. But it is equally clear that they might have inferred that Bowring & Co. received it in London as the M. S. Dollar Company's "London agents" and that it was "executed" there exactly as Comyn and Dollar said it was. If they inferred the former, they found that Bowring & Co. were brokers, in the American sense, and the case of Hooper v. California would apply; if the latter, they found that they were mere agents, and the Hooper case would have no application.

The lower Court could not tell which they would hold and hence should have construed the contract in the light of the law of *both* countries.

VIII.

A Valuation of the Hull is Not a Valuation of the Profits From the Use of the Vessel for an Indefinite and Uncertain Period.

Our opponent has misstated our position on this point. Our contention is that the plaintiff is not entitled to a verdict for the *full* amount of its policy, as awarded by the jury, because the plaintiff's interest in the hull of the vessel is not shown to be an entire interest, either legal or beneficial.

The issue on the amount of the damage to plaintiff was raised by paragraph X of our answer (p. 99) and brought here as shown at page 11 of our opening brief.

We do not attempt to deny that the valuation of the hull is binding upon both parties, nor do we question the correctness of this as a valuation *of the hull.* But there always remains to be proved *the amount of the plaintiff's interest* in the hull.

For instance, suppose the insurance is for £5,000 on the hull of a vessel valued at £5,000, and the insured at the trial proves an interest in but 1/32 of the hull. Could it properly be claimed that the insured would recover £5,000 on his 1/32 interest? His loss in such a case is one-thirty-second of the value of the ship or less than £157 and this is all he can recover.

The rule is stated by Arnould as follows:

> "345. It is not to be understood, however, from what has just been stated that the valuation in the policy precludes the inquiry whether in fact the assured had an insurable interest *in the whole of the*

> *subject of the valuation,* or whether the whole interest valued was ever at risk. * * * Still more is it competent to the underwriters to show that the assured had no interest at all."
>
> Arnould, 7th Ed., Sec. 345, citing many cases.

In spite of the elementary character of this proposition we find our opponent asserting that "it is immaterial *what* interest the assured has, so long as he has "some interest at risk" (italics his) and he cites Standard Marine Ins. Co. v. Nome Beach Lighterage and Transportation Co., 133 Fed. 646, to sustain this proposition. An examination of that case shows that the question at stake there was not one of the *amount* of the *interest* of the insured but merely as to whether the valuation of the hull should be considered as fixed between the parties for the purposes of adjusting a partial as well as a total loss. If the words quoted were used in the sense counsel has used them here, then plaintiff would be entitled to recover the whole £3,000 even though it be shown that its interest in the vessel were but one-thousandth of the whole. We challenge counsel to produce a case holding that the valuation of the hull must be accepted as the valuation of the plaintiff's interest in the hull.

For the purposes of this argument let it be admitted that the insured has shown an insurable interest, and, in a sense, an interest in the hull. It was not an equitable interest, as we shall later point out. But even if it were in its nature equitable the plaintiff must show *what proportion of the whole value of the vessel his equitable interest represents.* Because one has *some*

equitable interest in a hull valued at £39,050 does not mean that his interest amounts *to the whole* of the hull so valued.

We have to thank our opponent for our best illustration of this point. It is the case of Davis v. Phoenix Insurance Company, 111 Cal. 414, the one last cited in his brief. In that case after deciding in the words there quoted that an equitable interest was an *insurable* interest, the Court states this question:

> "What *is the extent* of plaintiff's insurable interest?"

and proceeds to decide that the judgment below was erroneous because it awarded the entire face of the policy, whereas the plaintiff's equitable interest was shown to be less than half that amount. As in that case, unlike the present, the share of the plaintiff could be determined from the evidence, the higher Court directed the amount of the new judgment without ordering a new trial.

Davis v. Phoenix Ins. Co., 111 Cal. 409, at 415.

Plaintiff claims the right to recover on his equitable interest on the theory that he paid for the boat though the bare legal title went into another corporation.

The facts show, on the contrary, that the plaintiff was paid full compensation for the boat, as it received all the capital stock of the Arab Steamship Company, which thus became the owner of the boat, both legally and equitably.

Subsequently the Arab Company transferred her to the M. S. Dollar Co., Limited, of British Columbia, but

what the consideration was is not shown. For all we know it may have been $200,000, which has been distributed to the M. S. Dollar Co. of California as the owners of the stock of the Arab S. S. Co.

Nor does it appear who got the stock of the M. S. Dollar Co. Ltd. of British Columbia. For all that has been shown, this stock has at all times been held by British Columbia stockholders and the British Columbia corporation has collected full insurance for the vessel and distributed it to those stockholders. If this stock was held in part in British Columbia and part by the plaintiff then the plaintiff, if entitled to anything, should receive but its proportion of the £3,000 here sued for.

There is nothing in the record to show that the British Columbia corporation *holds the bare legal title* as asserted by Captain Dollar or that the San Francisco corporation *owns the equitable title* as asserted by Mr. Frank. The mere conclusions of the witness or his attorney as to the legal effect of the acts proved cannot be regarded as of greater weight than their description of the actual transactions on which their conclusions rest.

Taking Captain Dollar's statement as to the interest of the plaintiff and presuming this covers both the time of issuance of the policy and the loss of the vessel, to the effect that the plaintiff was entitled "to *operate* her " as owner under an arrangement whereby all the prof- " its were to go to the California corporation, and the " California corporation was to take entire management " and control of the ship and business", this does not show that the complete ownership of the hull was in the plaintiff.

As we have pointed out in our opening brief, to make this equivalent to the complete ownership of the hull, it should be first shown that this "arrangement" was to continue as long as the usefulness of the shipper as a carrier continued and also that at the end of that period when the hull could be sold for junk the San Francisco corporation could then take the proceeds of such a sale. On the contrary there is no evidence to show how long the "arrangement" permitted the plaintiff to take the profits of her voyaging, nor any evidence whatever, to show that the proceeds of the sale of her hulk were to belong to the plaintiff.

Certainly this is not showing that the plaintiff (in the words of Arnould, *supra*), "had in fact an insurable in-" terest *in the whole of the subject* of the valuation". And yet the jury was justified in bringing in the verdict they did only on the theory that the plaintiff's interest covered the entire ownership of the hull.

We do not question the right of the plaintiff to recover on behalf of the owners of the interests which were covered by the policy, *if the plaintiff had alleged and proved that the suit was in fact brought on behalf of these other persons.* But we do not find a line in the complaint showing that the suit was brought on behalf of any person other than the plaintiff nor a word of testimony to show that the plaintiff is *claiming* any damages other *than his own.* While it is true that the complaint alleges that the policy insures the two separate interests of the British Columbia and the California corporation (par. VIII, page 80), it accentuates our point

by claiming damages for the latter corporation alone (par. XII, p. 80).

Surely the jury is not entitled to bring in a verdict based on a composite of several interests of which the plaintiff's is only one, unless the issue as to the right of these other interests to recover in this action is tendered by the pleadings and supported by proof. No case has been cited by our opponent, holding the plaintiff entitled to recover where the policy has been effected for some one else, as well as himself, unless he has *claimed* the damages for this other person and *proved* his right to sue for them.

In the first case cited, Hagan v. Insurance Co., 186 U. S. 430, Martin, the person really insured, though not mentioned in the policy, was a party to the action, alleging his own losses and proving them under that allegation.

In the second case cited, Rider v. Ocean Marine Ins. Co., 20 Pick. 259, our exact contention is laid down as the law, the Court holding that one suing for another must *prove* that he is suing in that capacity and not for himself.

Parsons also states the rule as follows:

> "If the insurance be by a part owner in his own name, the *prima facie* presumption is that the insurance is for his separate interest and he would bring the action in his own name, and hold the amount recovered without liability to the other part owners."
>
> Parsons Marine Insurance, Vol. 2, p. 465.

The same reasoning applies where the interest of the plaintiff is merely in the profits of operating the vessel. Prima facie the suit is for this interest and there is no *testimony* that the plaintiff is suing on behalf of any one else. On the contrary, its attorney claims, but does not prove, that the *entire beneficial interest* is in the plaintiff, and hence he cannot be suing in behalf of any other person.

For all that has been shown it may well be that had it been alleged that the plaintiff was suing on behalf of the M. S. Dollar Co., Limited, as well as itself, we could have shown that the former company had collected full insurance for its share; or that it had transferred its interest before the loss; or that it had wired the Japanese to take the vessel as this insurance would more than compensate them.

All of these might have been proper defenses against the claim of the Dollar Co., Ltd., if plaintiff had alleged that the interest of that corporation was being sued for. It is apparent that the claim for the latter corporation is a mere afterthought to piece out plaintiff's case.

It is therefore submitted that the evidence does not sustain the verdict that plaintiff was damaged to the full face of the policy, and fails to show the *amount* of any damage to it.

In conclusion we submit that for any of the several errors we have shown, the case should be reversed and a new trial ordered.

WILLIAM DENMAN,
Attorney for Plaintiff in Error.

No. 1753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

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Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY (a corporation),

Defendant in Error.

Supplemental Brief on Behalf of Defendant in Error.

NATHAN H. FRANK,
Attorney for Defendant in Error.

Filed this.....day of January, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Supplemental Brief on Behalf of Defendant in Error.

I.

We note with interest the minute subdivision of risks insured against under the "capture, seizure and detention" clause of the policy, presented by appellant with a view of showing that the false papers could not have been contemplated by the parties at the time of entering into the contract. A glance at the subdivisions is enough to show that they are all, one after the other, consequences of an attempt at capture, or of an attempt to escape capture, the necessity of running into which

successive dangers is calculated to be avoided by the credentials contained in the false papers. Just think of a blockade runner, with a signal from a cruiser to halt, in the shape of a shot across her bow, attempting to "run for it"! Would he not think it wiser to have properly prepared credentials in the hope by their aid of being permitted to pass peaceably by? From the universality of the practice, we must conclude that such is the common sense of mankind.

II.

THE TESTIMONY OF THE WITNESS COMYN.

This subject is discussed at length in our former brief on pages 24 to 39. It seems now to be the burden of most of plaintiff's reply brief, where it is treated on pages 4 and 5 and 27 to 36, under the following headings:

"II.

"The contract should have been construed for the "jury both in the light of the English and the Ameri- "can law;" (pp. 4 & 5.)

"VI.

"On the evidence the jury could rationally have in- "ferred that the policy was delivered to the Dollar "Company in London;" (pp. 27 to 34.)

"VII.

"The decision in Hooper v. State of California does "not hold that every person who obtains insurance for

"another is the agent of the insurance company for "the delivery of the policy, but merely that a broker "exercises such function." (pp. 35 & 36.)

If, in the references to instructions by the court upon the law of England under the above heads, appellant refers to the requested instructions respecting the use of a false clearance, the argument contained in the above mentioned pages of the reply brief is only another statement of appellant's contention previously fully argued on both sides, that it was the duty of the court to instruct the jury peremptorily upon those questions of English law, instead of submitting said questions to them as questions of fact.

In that phase, it does not require further discussion.

The suggestion, however, that the requested instructions were in some wise connected with Comyn's testimony, should not be allowed to find lodgment in the mind of the court.

It must, on the face of it, be apparent that the requested instructions on the law of false papers have no connection with the admission or rejection of the testimony of the witness Comyn, since they could in no wise aid the jury in determining whether or no the policy was, under the law, to be considered as having been delivered in San Francisco, or as having been delivered in London. That is purely a question of *lex fori.*

Moreover, so far as the law of agency or place of delivery is concerned, there were no instructions asked, nor instructions given, that have any relation thereto,

or that affect any conclusions that might be reached under the facts testified to by Comyn, except the following: 1. The instruction given, that the jury were to *disregard* said evidence, "unless it appeared" that "Comyn was the agent of defendant for that purpose"; but that the same person may, however, be the agent of both parties in a transaction of that kind, "and it "will be for you to determine *under the circumstances "of this case as they have been disclosed to you,* what "the fact was in that regard here" (p. 351). 2. The request (which was refused) for an instruction that the evidence *conclusively* showed that the policy was delivered in England. This latter was only another way of saying that the jury should "disregard" the testimony, without the qualification above referred to.

Under neither of these instructions was the English law involved. Neither was the English law, upon the question of agency or upon the question of delivery of the policy, put in issue by the pleadings.

So far as the English law WAS *put in issue by the pleadings and so far as the English law* WAS *in evidence before the jury,* THE JURY WAS INSTRUCTED THEREON. *Those instructions are set forth in our original brief on pages 51 to 56, under the heading,* "INSTRUCTIONS AS GIVEN BY THE COURT.".

The appellant therefore errs when he concludes, as in each of the above headings he does, "the jury may "have decided that the contract was executed in Eng- "land, but, *being uninstructed by the court,* erroneously "construed it in the light of the law of England as

"expressed by the earlier, and not the later, cases, and "decided against us on that ground" (p. 5). Or, again (p. 35), "As we have pointed out, if they came to this "conclusion, *they were unaided by any instruction from "the court* construing the contract in the light of the "law of England as shown by the evidence."

If the instructions given by the court, as set forth in our former brief, placed an erroneous construction upon the English law, that is a different matter, and discussed in the former briefs to a finish. But that does not warrant the assertion that "they were uninstructed by the court", which is misleading.

If, on the other hand, the jury did not "disregard" Comyn's testimony, as they were instructed they might, then they found that the contract was executed here, and their verdict is right under what is conceded American law. In that view, it would be immaterial whether they were instructed or not instructed upon any phase of the English or American law (Our former brief, p. 7).

From the foregoing it seems apparent that the entire argument submitted in the reply brief, as comprised within the pages mentioned, is fallacious.

There are, however, some minor matters mentioned therein which deserve comment.

The testimony quoted on pages 30 and 31 is only calculated to show that the "jury *could* rationally infer "that the policy was delivered to the M. S. Dollar "Steamship Company in London"; and the quotation from Arnould (of which we shall speak later) to show

that appellant's hypothesis "is consistent with reason-" able business methods". But when all that has been said and done, it is admitted that the question *is one for the jury,* which they would have the right to determine either way. If so, *barring error of law,* their finding is conclusive, and neither of the above matters are material to this appeal.

Since the error of law complained of is, as above indicated, confined to an assumption that the jury came to this conclusion "*unaided by any instructions* from the " court construing the contract in the light of the law " of England, as shown from the evidence" (p. 34); the entire argument is fully answered when as we have shown that the jury *was* instructed, or, as is also the fact, *that the law on that subject was neither in evidence nor put in issue by the pleadings.*

In this latter connection, we do not overlook the quotation from Arnould on Insurance on page 32 of appellant's brief, which appellant admits is *not* "to be deemed " in evidence before the jury", but is merely to show that his hypothesis is "consistent with reasonable busi-" ness methods" (p. 33). Not only was that not in evidence, *but it could not have been admitted in evidence if offered,* and so has no legitimate place in the brief. Neither the custom mentioned by Arnould, nor "reasonable business methods" have anything to do with this transaction. Besides not being pleaded, the question as to *who* is liable for the premium is *fixed by a plain and unambiguous contract,* which excludes evidence of custom. By it plaintiff is made *directly* liable to the defend-

ant for the premium. The policy provides that the insurance is "proposed to the Maritime Insurance Com- "pany, Limited, *by* M. S. Dollar Steamship Co." and " in consideration of the *said person* or persons effecting " this policy *promising to pay* the said company the sum " of seven hundred and eighty-seven pounds 10/ as a " premium", etc., the company takes upon itself the burden of the insurance. That excerpt from Arnould should not, therefore, be permitted to have any weight in this controversy.

The comments on the decision of Hooper v. State of California contained on pages 35 and 36 of Appellant's Reply Brief, are likewise inapplicable.

The distinction there suggested is immaterial, for appellant admits that the jury *might* have inferred from the evidence of Comyn that Bowring & Co. were acting as brokers, and further, that if they so inferred, the case of Hooper v. California would apply. The fact that they might also have inferred otherwise is immaterial, for the legal presumption is that they found the fact such as will support the judgment, and on that question their finding is conclusive. For the purpose of this appeal, therefore, we must treat Bowring & Co. as brokers, and Hooper v. State of California as controlling.

This should dispose of any question relating to the effect of that decision.

III.

REPLY BRIEF POINT III, p. 6.

This matter does not require any reply further than that of our original brief on pages 69 to 75. We note, however, appellant's persistent endeavor to make capital out of the amendment of the complaint with respect to ownership *at the time* of insurance—there having been a transfer, and a mistake as to the time thereof corrected —and his like persistent misrepresentation respecting the oath to the clearance. As we think we sufficiently replied to this on the oral argument, we mention it now, only to recall that reply, and to meet the suggestion in appellant's reply brief (p. 14), that it is Mr. Dollar's "misfortune if his counsel has not protected him from "*misrepresentation.*"

IV.

AS TO THE CASES OF HORNEYER v. LUSHINGTON AND OSWELL v. VIGNE BEING THE LAW OF ENGLAND TO-DAY (Brief, p. 15).

In reply to this, we wish only to add to what our former brief contains, that one decision is not conclusive of the law, any more than one swallow makes a summer. This is as true of the *last* decision as of the *last* swallow whose moving was delayed into autumn.

The Court of King's Bench in 1812 was not the court of last resort, and in determining what the law is, its decisions must be considered only in connection with and not exclusive of other decisions previously rendered.

As once said by Lord Mansfield:

> "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."

V.

INSURABLE INTEREST.

Appellant opens his reply, on this point, with the statement that "Our opponent has misstated our posi-" tion on this point" (p. 37).

In his opening brief he argued that there was no evidence of the interest of assured *at the time of the loss,* which we demonstrated in our reply to be error. He now presses a contention that we have not shown an insurable interest *in the whole subject of the valuation.*

That we did not "misstate" his former position is evidenced by the following excerpts from his former brief:

"The interest of the insured must exist at the time " of the receipt of the policy and the time of the loss. " 9 Cyc., 584 and cases cited.

"The answer raised the issue as to the insured's " interest at the time of the loss, i. e., early in the year " 1905 (pp. 96, 97, 98).

"The president of the insured describes the interest " at *the time of the issuance of the policy* on December " 24, 1904, as that of a right to take the profits of the " vessel for a period and consideration not shown. It " appears that the vessel was bought back from the

"Japanese at her condemnation sale, in the spring of "1905, and *at the time of the trial* the equitable owner- "ship, according to Mr. Dollar's opinion, was in the "San Francisco corporation, while the legal title was "in the Columbia corporation." (p. 41.) (The italics are his own.)

* * * * * * * *

Again:

"'Mr. Dollar—The owner of that ship is the Cali- "fornia corporation, and the company in British Col- "umbia simply **is** the holding company, and they "**have** no interest in it whatever. The legal title "**is** in the British corporation; the real title, the real "owner, **is** a San Francisco corporation; the people "who put up the money are San Francisco people.'"

"It is submitted that the evidence of the interest of "the insured in December, 1904, or in the spring of "1905, *some weeks after the condemnation,* when the "vessel was repurchased, or more than four years after "the loss, when Captain Dollar was on the witness "stand, is no evidence at all of the interest at the "*time* of the loss.

"The burden of proof is on the insured to show his "interest at that moment." (p. 42.) (The italics and black letter are both his.)

* * * * * * * *

Again:

"It may be urged that the interest shown at the time "of the issuance of the policy is presumed to continue "to the loss of the vessel. We know of no such pre-

"sumption, and believe that the proof must be made "for each occasion." (p. 42.)

To that argument we made reply showing that the proof *does* cover the ownership both at the time of the issuance of the policy and at the time of the loss (Respondent's Brief, pp. 77-79). In that, we scarcely can be accused of "misstating" his position.

Interest in the Whole Subject of the Valuation—Let us now consider his new argument on the question of insurable interest, viz.: that there is no evidence of interest "in the whole subject of the valuation."

The policy contains this provision:

"And it is also agreed and declared that the *subject* "*matter* of this policy, *as between the insured and* "*said company* so far as concerns this policy shall "be and is as follows:
"On hull and materials, valued at.....£
"Machinery and boilers, valued at.....£
"and everything connected therewith.....£37,050
"of the ship or vessel called the M. S. Dollar", etc.

The party insured is the "M. S. Dollar Steamship "Co., as well in their own name as for and in the name "and names of all and every other person or persons to "whom the subject matter of this policy may or shall "appertain in part or in all".

As shown in our original brief (p. 79) "The Califor- "nia corporation furnished *all* the money for the pur- "chase of the vessel *by* the Arab Steamship Company." (Rec. p. 134.) The legal title was placed in the Arab

Steamship Co. a British corporation to preserve her British Register and the stock of that corporation issued to plaintiff. Subsequently the legal title was transferred to another British corporation.

Does not the fact that the plaintiff paid *all* the money for the purchase of the vessel, indicate that its equitable interest extended to the "*whole* of the hull"?

And what warrant is there for the statement:

"The facts show, on the contrary, that *plaintiff was* "*paid* full compensation for the boat, *as it received* "all the capital stock of the Arab Steamship Com- "pany, which thus became the owner of the boat, *both* "*legally and equitably*"!! (Reply of Ins. Co., p. 39.)

Is there a single word in the record to indicate that the California corporation "received" that stock in consideration of the advance of the money to buy that steamer? The record says:

"The stock of the Arab Steamship Company con- "sisted of 1800 shares. The California corporation "*owned* 1795 of those shares."

The other five were held by the directors and by them endorsed and turned over to the plaintiff. (pp. 134-135.) So the plaintiff *owned* all the stock of the Arab Steamship Company.

From that company the bare legal title was transferred to another holding company.

"The owner of that ship is the California corpora- "tion, and the company in British Columbia simply "is the holding company, and they have no interest

" in it whatever. The legal title is in the British cor-
" poration; the real owner, is a San Fran-
" cisco corporation; the people who put up the money
" are San Francisco people" (Rec. p. 143).

That testimony went to the jury without objection. It will not do now to say as appellant does:

"The mere conclusions of the witness or his attorney
" as to the legal effect of the acts proved cannot be
" regarded as of *greater weight* than their description
" of the actual transactions on which their conclusions
" rest."

Assuming the above to be a conclusion (which the record does not warrant because it is only a statement of the substance of the testimony) still, is it now our province to weigh conflicting evidence? That was for the jury. So long as that testimony is properly before them, their verdict is conclusive. Since the evidence justifies the finding of an insurable interest in the *whole* subject of insurance, the argument should be at an end.

So, too, the attempt to transfer our interest from an interest in the hull to an interest in her profits, is also unwarranted. Plaintiff "operated her *as owner* under
" an arrangement whereby *all* the profits were to go to
" the California corporation, and the California corpora-
" tion was to take entire management and control of the
" ship and the business." (Rec. p. 135.) That is entirely and only consistent with ownership of the hull, and is but cumulative evidence thereof.

In view of the foregoing, we submit that there was, at least, *some* evidence, if not *demonstrative* evidence, to go to the jury, of an insurable interest in the whole of the subject of the valuation. If so, appellant is concluded by the verdict, and the question is not open for discussion here.

Respectfully submitted,

NATHAN H. FRANK,

Attorney for Defendant in Error.

No. 1753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MARITIME INSURANCE COMPANY
(a corporation),

Plaintiff in Error,

vs.

THE M. S. DOLLAR STEAMSHIP COMPANY
(a corporation),

Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

WILLIAM DENMAN,
Attorney for Plaintiff in Error and Petitioner.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO

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PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

Summary of Court's Error.

In this case the opinion agrees with our contention that as the jury might have found that the policy was delivered either in England or America the law of both countries should have been given to the jury.

It is our contention that the evidence showed the law of England to be that an insurer is not liable for

condemnation for carrying false papers unless he gives *express consent* for their carriage and that consent can *not be inferred* although the policy describe a voyage involving acts prohibited by the belligerents, as for instance, running a blockade where false papers might be *helpful,* or even where the entire insured voyage was prohibited by the Government of the port of destination, making the false papers *absolutely essential* to escape condemnation.

It is our contention that it is the American law that it should be *left to the jury to determine* whether false papers used in any case are proper precautions for the particular voyage in question and whether these tended to increase the risk of condemnation.

The opinion of the court is that the law of England does not require an express consent of the insurers to carry false papers but that the consent may be inferred from the fact that the part of the voyage prohibited by the belligerent, in this instance, blockade running, might be more successfully prosecuted if such papers were used. It bases this conclusion as to the law of England on a part of the excerpts from Duer, an American author and attempts to distinguish two English cases cited to show the law of England to be otherwise.

The court further holds that it is the law of this country that *any kind* of false papers may be used on a blockade running voyage and that there is no question for the jury even though, as in this case, there is evidence that the papers are of so stupid and reckless a nature

that they not only increased the risk of capture by one belligerent but unnecessarily exposed her to capture by the other. In so holding, the opinion does not mention *Livingston v. Maryland Insurance Co.,* 7 Cranch. 508, in which the question was considered and decided.

We respectfully ask for a rehearing on the ground that the opinion of the court contained serious error in two points;

1. It says that the two English cases contained no provisions from which the right to carry false papers may be inferred, *whereas,* in fact, no stronger cases could be imagined from which that right could have been inferred. In the one case the exhibition of the true papers showing the nature of the voyage described in the voyage clause would have made condemnation certain, as the voyage had been prohibited by Russia, the Government of the port of destination; while in the other, the exhibition of the true papers to any Danish privateer boarding her would have made condemnation equally certain, as they also would have shown a voyage prohibited by Denmark.

2. It treats the American law as being that *any* false papers may be used on a voyage to a blockaded port, whereas it is clearly established by the Supreme Court in the case of *Livingston v. Maryland Insurance Co.,* that it is a question for the *jury* to determine whether the particular papers are customary on the voyage in question and whether they tended to increase the risk of condemnation.

It is urged that unless the court had by inadvertence failed to read that portion of *Duer on Insurance* in which he expressly says that the law of England on the question of false papers, as shown by one of the two English cases relied upon here, differs from the law of America, and unless the court had by inadvertence failed to read that Duer was an American author writing on the law of marine insurance as it is in *"our"* country, it would not have cited that work as laying down the *English* law as to the effect of using such papers.

It is further urged that unless it had by inadvertence believed that Duer was laying down the law of England it would not have ignored the testimony of John Andrew Hamilton, K. C., now Judge Hamilton of the Court of Appeal, and Mr. Simey, the author, or *Arnould on Marine Insurance,* the leading *English* text book on the law of Marine Insurance in *England.*

We feel that the court has not examined the testimony of these English witnesses nor of this English text book, for no mention of them is made in the opinion. No fair summary of the facts in this case could have been made without mentioning them, as they constitute the only direct evidence in the record of the law of England, save the three cases,—that is to say no such fair and just and painstaking summary of the facts as the members of this bar have come to learn it is the intention of this court to give in its decisions.

It is also inconceivable to us that the court could have written the opinion filed, unless by inadvertence it had

failed to give full consideration to the decision in *Livingstone v. Maryland Insurance Co.* And we feel certain that it has not done so as no mention of the case is made in the opinion, although a large portion of your argument was based upon it.

I.

The Decision Fails to Recognize the Facts in Oswell v. Vigne and Horneyer v. Lushington Which Make Them Identical With the Case at Bar.

The *ratio decidendi* of the decision in this case is that it is not controlled by *Oswell v. Vigne* and *Horneyer v. Lushington*, because here the voyage contemplated blockade running from which the right to carry false papers might be implied, whereas in the two English cases the nature of the insured voyages did not permit of such an implication.

The following two sentences from the court's opinion show the reasoning on which the court held that the case at bar was not within the rule of the two English cases:

"Insurance companies, like everybody else, must be "held to know that blockade runners in war times re- "sort, and necessarily must resort to many kinds of "subterfuge—among others to the carrying of false "papers. Indeed, that is one of the most notorious."

* * * * * *

"In neither of these English cases (the *Horneyer* and "*Oswell* cases) did the policy of insurance contain any "express consent to the carrying of false papers, nor "did either of them contain any clause from which such "consent could be inferred."

It is apparent that if the voyage clauses in the policies of the two English cases *did* describe voyages from which the right to carry false papers might be inferred—nay, further, if they were voyages on which the presen-

tation of the *true* papers would have made capture certain,—then there is no distinction between these cases and the case at bar. As the underwriter was held not liable in these two cases, so if they cannot be distinguished from the case at bar he should be exonerated here.

Both these English cases arose out of one phase or another of the Napoleonic Wars. It is elemental that the court will take judicial notice of the history of these times and of the use made by belligerents of the prohibition of any commerce with an enemy.

Russia was at war with Sweden and had prohibited any commerce from Sweden to her ports. It is apparent that no vessel could successfully undertake such a voyage if the papers it presented at the Russian destination truly showed the voyage to have been from a Swedish port. Denmark was at war with England and it was a cause of condemnation in the former country if a vessel had landed in England. It is equally apparent that if a vessel had carried only *true* papers on a voyage from England to Russia, her condemnation would be certain if she were boarded by a Danish privateer.

The court will also take judicial notice that under the law of nations every vessel *must* carry a clearance from the port from which she sails to the port of her destination, and that she must show such a clearance to any war vessel boarding her and to the authorities at the port of destination. An underwriter insuring a voyage from a Swedish port to a Russian port knew that if the Russian port officers on inspecting the vessel's papers

saw her true clearance the vessel would stand convicted. So likewise the underwriters insuring a voyage from England to Russia knew that if a Danish privateer boarded the vessel and saw the true clearance, the vessel would be condemned.

And yet the court says that the policies containing clauses describing such prohibited voyages, "contain no " clause from which consent to carry false papers could " be inferred".

If no such consent can be inferred from a policy insuring a voyage prohibited *in toto* by the enemy, how can it be inferred from a policy which insures a voyage to a port which may or may not be blockaded? If such consent can be inferred from a policy insuring a voyage which involves entering a blockaded port, which is prohibited by the belligerent, a danger at the end of the voyage only, must it not also be inferred where the voyage in its entirety is prohibited by the belligerent?

In the case of *Horneyer v. Lushington,* 15 East 46 (Transcript page 276), the insurance was for a voyage from Gottenberg, Sweden, to Riga, Russia. Russia was at war with Sweden and had prohibited the voyage. The vessel carried false papers showing her to have taken a voyage not prohibited. The English court held that the underwriter was not liable because the condemnation was based on the carriage of false papers. The opinion of this court is that a policy describing that prohibited voyage from Sweden to Russia contained nothing from which the underwriter's consent to carry

false papers describing an innocent voyage can be inferred, and hence that the case is not an authority for the proposition that consent to carry false papers must be expressly given and cannot be implied.

So also this court says of the case of *Oswell v. Vigne,* 15 East 70 (Trans. p. 283), that a policy whose voyage clause described a voyage prohibited by Denmark did not permit an inference that she could carry false papers describing a voyage not prohibited by Denmark.

It is submitted that the error of this court in interpreting these two decisions appears on inspection and to a mathematical demonstration. As they are the final authority in this case as to the law of England and as they clearly support the position of the plaintiff in error, it is submitted that the lower court erred in refusing to state to the jury what they showed the law of England to be.

II.

The Inadvertence of the Court in Accepting the Views of Mr. Duer, an American Author Writing on the American Law, as a Description of the English Law, and in Overlooking the Fact That He Expressly Distinguishes It From the English Law.

The court's opinion attempts to describe the law of England as to the liability of the insurer for a loss from condemnation for carrying false papers where no *express* permission is given to carry them. It relies on a passage from Duer. Duer is an American author writing on the American law. He expressly distinguishes the English rule as laid down in *Oswell v. Vigne,* the second of the two cases attempted to be distinguished in the opinion, from the American rule, as follows:

> "It seems, therefore, a very just observation of Benecke, on the decision of the King's Bench, in **Oswell v. Vigne,** that as it was known to the insurer when the policy was effected, that the vessel insured would be liable to seizure in the continental port of destination, unless by false papers, the fact of her having sailed from England, could be concealed, his consent to the use of such papers, *ought to have been implied.* They were rendered necessary by the nature of the voyage and it was for the benefit of the insurer that they should be used. *It may be regarded as certain, that in the United States, such would have been the decision.*" (Italics ours.)
>
> *Duer,* Section 48;
>
> Record, p. 310.

It is thus apparent that Mr. Duer, instead of supporting the view taken in the opinion, expressly disagrees with it; and plainly means that it is the law of England that the court will not charge the underwriter for a loss from the use of false papers without express permission, even where the circumstances are as strong as they could conceivably be, for implying the right to use them.

That Duer is describing the American law only is apparent from the following:

> "Sec. 21. It remains only to add, that the decisions of the Supreme Court of the United States on all questions of international law, even where they differ from the opinions of jurists, or the adjudications of the English admiralty, must be followed and obeyed, not only by the inferior courts of the United States, but by all the courts of the respective states of the Union. So long as they remain unchanged by the tribunal that pronounced them, they are conclusive evidence of the law of nations, as understood and maintained by *our own* government. We have seen, however, that this necessity for disregarding *foreign* authority rarely occurs, since there is scarcely a decision in the courts of Westminster, on any general question of public law, that has not been expressly, or by a necessary implication, approved and sanctioned by *our* national courts. On questions that have not yet been decided in *our own* courts, the decisions of the English admiralty are certainly to be regarded as presumptive, although *not conclusive* evidence, of the existing law, that both countries equally recognize, and are bound to follow." (Italics ours.)
>
> *Duer,* Sec. 21;
>
> Transcript, p. 325.

Can it be anything but an inadvertence when the court relies on Section 47 of Mr. Duer's book in determining the law of *England?*

III.

The Inadvertence of the Court in Ignoring the Only English Testimony as to the English Law.

The defendant is a British corporation, sued on a contract executed in England and claims the right to have it interpreted under the law of England.

To show the law of its country, it introduced the testimony of John Andrew Hamilton, then a King's Counsel and now one of the Judges of the Court of Appeal, admittedly one of the ablest, if not the ablest, maritime lawyer in England. Hamilton's name appears on one side or the other of the majority of great English maritime cases reported in the last twenty years.

It also introduced the testimony of Ralph Iliff Simey, the well known author on the English law of marine insurance.

Both these men testify positively and without question that it is the law of Great Britain today that an underwriter is not liable for a condemnation from the use of false papers unless *express* permission be given, even where the right to use such papers seems a necessary implication from the nature of the voyage.

Both men testify that it is the law of England that under the facts in this case the underwriter would not be liable.

In addition to this, the following passage from *Arnould on Marine Insurance*, unquestionably the leading authority on the law of Marine Insurance in Great Britain, was introduced in evidence:

> "Owing to the unexampled difficulties thrown in the way of English commerce during the great

French wars, it became necessary to carry on trade with the Continent by the aid of simulated papers; yet our courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them.

"Thus, where a British ship sailed from London for the Baltic and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held that, as the policy contained no liberty to carry such papers, the assured could not recover, **although it was notorious that the trade sought to be protected by the policy could not be carried on without such papers, so that the fact of having them on board actually tended to diminish the risk**; and the decision of the Court was the same where the fact of carrying such simulated papers appeared by the sentence to be at least one of the efficient causes of condemnation.

"Of course, if the underwriters have agreed to the insertion on the face of the policy of a license to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground." (Transcript p. 298.)

Arnould on Marine Insurance, 2nd Ed. p. 733, 734;

Arnould on Marine Insurance, 7th Ed. p. 732.

No English lawyer, nor any English writer is offered to controvert this evidence.

It is submitted that only by inadvertence could the testimony of these distinguished experts and of this high authority have been omitted from the court's summary of the evidence on which it based its conclusion as to the law of England.

IV.

The Error of the Court in Ignoring Livingstone v. Maryland Insurance Co., and Deciding That Under the American Law ANY False Papers May Be Used, no Matter How Recklessly Drawn or Unnecessary for the Voyage, and That There Can Be no Question for the Jury as to the Propriety of the Particular Papers Used in a Particular Case.

It is conceded by our opponent, and by the lower court and the court here, that the jury might have found that the policy was executed either here or in England. It therefore became necessary to instruct the jury as to the laws of both countries.

Judge Van Fleet instructed the jury that under the American law, if they inferred from the clause in the policy "with liberty to run blockade" that the vessel had the right to use false papers then

> "I instruct you that the carriage and use by the plaintiff of *false papers on the voyage in question* does not affect its right to recover, and that the defendant is liable notwithstanding the use of *such false* papers."
>
> (14 Assignment of Error, Transcript page 380.)

That is to say if *any* false papers might have been proper then the particular false papers used were proper.

The false papers carried "on the voyage in question" instead of describing the voyage as to one of the many

neutral ports on the China coast below Vladivostok, to which the cargo might be innocently consigned, and which might have deceived the Japanese, **gave as its destination Moji, Japan,** a port of one of the two belligerents.

The port of Moji is several days' steaming to the south of any of the routes from San Francisco to Vladivostok and is not a coaling port for the voyage to the latter place. In taking out the papers at the San Francisco Custom House, her master swore that the cargo was to be landed at Moji (Transcript page 219). This would at once suggest to the Japanese officials to examine the importers and merchants at Moji and determine whether such a cargo was in fact destined there. There were also Russian cruisers sailing in these waters at that time (page 184, 145). One of these might have captured her, discovered her Moji clearance and detained her because of the statement of her log—which showed an attempted voyage to Vladivostok by the northern route—on the theory that the Moji papers described the *true* destination and the log was a false means to evade Russian capture. The evidence does not show to whom the cargo was consigned, and the bills of lading apparently being to order, indicated as much a Japanese as a Russian delivery.

While it is true that the danger of *ultimate condemnation* by the Russians was slight, the likelihood of Russian seizure and detention with the false Japanese papers was a serious menace. *Such a seizure and de-*

tention constitute a total loss under the American law even though the vessel be subsequently released.

Rhinelander v. Insurance Co., 4 Cranch. 29 at 41;
Olivera v. Union Ins. Co., 3 Wheaton 183;
Marshall v. Delaware Ins. Co., 4 Cranch. 202.

All the experts were agreed that the false papers in customary use by blockade runners had a *neutral* destination.

Hengstler, Trans. p. 170, 171;
Kempf, Trans. p. 166.

It was our contention that it was a *question for the jury* whether the use of *this kind* of false papers could be inferred from the nature of the voyage, when papers to a neutral port would have not exposed the vessel to these added and unnecessary risks from both belligerents.

The court in its opinion apparently agrees with Judge Van Fleet that *any* false papers may be used, however reckless and unnecessary, for it disposes of our contention in the following language:

"Insurance Companies, like everybody else, must be " held to know that blockade runners in war times re- " sort, and necessarily must resort to many kinds of " subterfuge—among others to the carrying of false " papers. Indeed that is one of the most notorious."

Standing by itself, one can not cavil at this sentence. As an answer to our proposition that the jury should decide whether in this case these particular papers were a proper subterfuge for this particular voyage,

it is clearly erroneous and opposed to the rule laid down by the Supreme Court in

Livingstone v. Maryland Insurance Co., 7 Cranch. 506.

In that case Chief Justice Marshall says in granting a new trial, because the court below failed to give the following instructions:

> "If the jury should be of opinion that the Spanish *papers mentioned in the case,* were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact that they would be on board would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that *it was the regular usage of the trade to take such papers on board,* that they would not vitiate the policy."
>
> "The instruction of the Circuit Court to the jury *ought to have conformed* to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact to which this court attached much importance. It is the unanimous opinion of this court, that in giving this instruction the Circuit Court erred." (Italics ours.)
>
> *Livingston v. Maryland Ins. Co.,* 7 Cranch. 537.

Mr. Duer, in that portion of his book read in evidence by Mr. Frank, on page 309 of the Record, speaking of the above case says "the opinion of the court was that "*if the jury believed,* from the evidence, that the use of "false papers *was necessary,* or justified by the *usage* "*of the trade,* there was no concealment that could "affect the right of the plaintiff to recover". Duer also cites *Calbreath v. Gracey,* Federal Cases 2296, where

Justice Washington holds that it is a question *for the jury to determine* whether or not the methods *actually used* to deceive the enemy are justified *by the course of the trade.*

Calbreath v. Gracey, 1 Wash. (C. C.) 192.

Not only does the holding that the insured may use *any* false papers, however reckless, violate the rule laid down in the Livingstone case, but also it violates the rule laid down by Judge Ross in *Nome Beach Lighterage, etc. Co. v. Standard Marine Insurance Co.,* to the effect that it is for the jury to determine whether the insurers were not exonerated because the insured's wilful and reckless act was the cause of the loss.

Nome Beach Lighterage & T. Co. v. Standard Marine Insurance Co., 133 Fed. 636. (C. C. A.)

Prayer.

For the reasons above set forth, we pray that the court grant a re-hearing of this cause. In the event such re-hearing be denied, we pray for leave till the November term of the Supreme Court to file and call up a petition for a writ of certiorari and that the mandate be stayed herein until the decision of the Supreme Court on said petition.

WILLIAM DENMAN,
Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL CONCERNING PETITION FOR REHEARING.

I hereby certify that I am of counsel for Plaintiff in Error in the above entitled cause and that, in my judgment, the petition filed by the Plaintiff in Error, on or about the 18th day of March, 1910, is well founded in point of law as well as fact, and that said petition is not interposed for delay.

WILLIAM DENMAN
Counsel for Plaintiff in Error.

No. 1768

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOSEPHINE JANOSKI, in Her Own Behalf and as Guardian Ad Litem of AGNES JANOSKI, a Minor,

Plaintiffs in Error,

vs.

THE NORTHWESTERN IMPROVEMENT COMPANY (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Index.

[Names and Addresses of Attorneys.]

Messrs. BATES, PEER & PETERSON, #502 Equitable Building, Tacoma, Washington,
Attorneys for Plaintiffs in Error.

GEORGE T. REID, Esquire, and J. W. QUICK, Esquire, N. P. Headquarters Building, Tacoma, Washington,
Attorneys for Defendants in Error.

[Stipulation Relative to the Printing of the Record, for Assignment of Cause on September, 1909, Calendar, etc.]

[Telegram.]

[Western Union Telegraph Company.]

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F. D. Monckton,
Clerk Circuit Court of Appeals,
P. O. Bldg, San Francisco Cal.

It is Stipulated Janoski Versus Northwestern Improvement Co. Be heard Seattle clerk shall print only complaint answer reply bill of exceptions order settling same Judgment assignments of error court title of cause verifications endorsements omitted except first page mailing draft one hundred Forty nine dollars.

BATES, PEER & PETERSON,
Attys. Plaintiff in Error.

GEO. T. REID,
Attorney Defendant in Error.

Rec'd Sep. 1, 1909.
Ans'd Sep. 1, 1909.

[Endorsed]: No. 1768. United States Circuit Court of Appeals for the Ninth Circuit. Josephine Janoski etc. vs. Northwestern Improvement Company, a Corporation. Stipulation Relative to the Printing of the Record, for Assignment of Cause on September, 1909, Calendar, etc. Filed September 1, 1909. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1393.

JOSEPHINE JANOSKI, and AGNES JANOSKI, by JOSEPHINE JANOSKI, Her Guardian ad Litem Herein,

Plaintiffs,

vs.

NORTHWESTERN IMPROVEMENT COMPANY (a Corporation),

Defendant.

Complaint.

Come now plaintiffs and for cause of action herein allege:

I.

That plaintiff, Josephine Janoski, is the surviving wife of John Janoski, deceased, and guardian ad litem herein for plaintiff, Agnes Janoski, the nine year old minor child of plaintiff, Josephine Janoski, and John Janoski, deceased, and that both of said plaintiffs reside at Renton, in King County, State of Washington; that at all times hereinafter mentioned,

defendant was, and now is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a resident of that State, with its office and principal place of business at Tacoma, Washington.

2.

That at all times hereinafter mentioned the defendant was the owner and operator of extensive coal mines, coal-bunkers, washers and other coal mining machinery and appliances, at Melmont, in Pierce County, Washington, the proper and necessary operation of which said mines and mining plant required the employment by defendant, for different purposes, of a large number of men, among whom was the said John Janoski, deceased, who was employed by defendant, and who, at the time of the accident hereinafter referred to and for some time prior thereto, worked as a carpenter, electrician, machinist, and general mechanic around defendant's said mine and mining plant.

3.

That down in the basement of said plant was a large engine from which ran a manila transmission rope up to and around a large transmission wheel about twelve feet in diameter, attached to the end of a long shaft, from and by means of which, power was furnished to run the washers, pickers, and other machinery on the main floor above; that the end of said shaft to which said transmission wheel was attached, was supported by two large timbers about seventeen feet above said mine floor, and that a platform, about three feet in width, on a level with said

supporting timbers, extended along both sides and across the upper end of said wheel, said platform being reached by steps leading up from said main floor; that near the foot of said steps was a bell wire extending to the engine-room below, so that, if one on the main floor desired to start said transmission wheel, he could do so by signaling the engineer by pulling the wire; that the tension of said transmission rope was regulated by means of said rope passing around another wheel attached to a heavy weight sliding up and down two pipes parallel with the main rope, as it passed from the pulley-wheel on the engine to the upper side of the transmission wheel, said rope being tightened as the weight descended on said pipes, and being slackened as the weight was raised.

4.

That on October 5th, 1907, while the said John Janoski, deceased, was engaged in his said employment, one of the strands of said transmission rope broke and it became necessary to splice the same, and the transmission wheel was accordingly stopped to do this work; that in accordance with the orders and directions of defendant's superintendent, who had full charge and authority over the conduct and operation of said mine and plant, and the movements of the employees therein, said deceased together with several other workmen proceeded to the slicing of said rope; that after the splicing of said rope had been done in the presence of and under the directions and orders of said superintendent, said deceased, in accordance with the orders of said superintendent,

went up on said elevated platform to loosen said tension weight, which it had been necessary to raise up to slacken said rope before said splicing began, and also to remove certain twists and kinks from said rope near the top of said wheel which had been occasioned while said splicing had been going on, and also to remove a piece of two-inch pipe about eight feet long, that had been stuck through said wheel, across said supporting timbers, to block the wheel while said splicing was being done; that while the said deceased was upon said platform doing the work, that in accordance with said orders of said superintendent he had gone up there to do, but before he had finished said work, and before he had removed said pipe that was blocking said transmission wheel, suddenly and without notice or warning to or the knowledge of deceased, and while he was occupying said dangerous position, said superintendent carelessly and negligently, and in reckless disregard of the safety of deceased, directed and caused a signal to be given to the engineer to start said transmission wheel, and without notice or warning to said deceased, said wheel suddenly began to revolve with great velocity, doubling up said pipe and carrying it around on the spokes of said wheel, causing one of the ends of said pipe to strike the deceased on the head with fearful force, knocking him from said platform to the floor below, causing injuries rendering him unconscious, and from which he died the following morning.

5.

That at the time of his death and previous thereto,

the said John Janoski, deceased, was a man of industrious habits, and of good health; that he was of the age of thirty-seven years, and was capable of earning and was earning at the time of said accident one hundred and twenty dollars ($120.00) a month; that deceased was a prudent, kind and affectionate father and husband, and that these plaintiffs were entirely dependent upon him for support, maintenance and education.

6.

That because of the said carelessness and negligence of the said defendant causing the death of the said John Janoski, as hereinbefore set forth, plaintiffs have been and are deprived of his comfort, society, earnings, accumulation, support, maintenance, advice, counsel, education and training, as a father and husband, and are and have been damaged in the sum of Twenty-five Thousand Dollars ($25,000.00).

Wherefore, plaintiffs demand judgment in the sum of Twenty-five Thousand Dollars ($25,000.00), together with their costs herein.

BATES, PEER & PETERSON,
Attorneys for Plaintiff,
Office and Postoffice Address, 502 Equitable Bldg.,
Tacoma, Washington.
[Verified.]

[Title of Court and Cause.]

Answer.

Comes now the defendant and for answer to complaint says and alleges:

I.

For answer to paragraph I of the complaint, this defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and is a resident of that State, with its office and principal place of business in the city of Tacoma, Washington; and it alleges further that it has at all times complied with the laws of the State of Washington regulating foreign corporations doing business therein, and has paid its annual license fee last due. As to all the other matters and things set forth in paragraph I of the complaint, this defendant denies that it has any knowledge or information sufficient to form a belief therein, and for this reason denies the same.

II.

For answer to paragraph II of the complaint, this defendant admits that for some time prior to October 5th, 1907, it had in its employ one John Janoski as a carpenter and general repair man, at its Melmont mine, in Pierce County, Washington.

III.

For answer to paragraphs III and IV of the complaint, this defendant denies the same and each and every part thereof, and each and every allegation therein contained, except that it admits that on or about the 5th day of October, 1907, one John Janoski, a carpenter in its employ, was killed while working about the machinery in defendant's coal-washing plant, at its Melmont mine aforesaid.

IV.

For answer to paragraph V of the complaint, this

defendant denies that it has any knowledge or information sufficient to form a belief as to the matters and things therein set forth, and for this reason denies the same.

V.

For answer to paragraph VI of the complaint, this defendant denies the same and each and every part thereof, and denies that it has injured the plaintiff in the sum of Twenty-five Thousand Dollars ($25,000.00), or in any other sum whatsoever.

And for a further and affirmative answer and by way of statement of new matter constituting a defense, this defendant alleges:

First: That the accident hereinbefore admitted to have occurred, was occasioned by reason of the careless and negligent conduct of the deceased, John Janoski, himself, and not otherwise, in that he was performing his work at the time of the said accident in a careless, negligent and unworkmanlike manner; in that he disobeyed the orders and instructions given him by those in charge of the work upon which he was engaged at the time, to provide for his safety and protection, and in that he negligently placed himself in a dangerous position, and failed to exercise his mental faculties to observe, escape or avoid the risks and dangers of his position.

Second: That if the accident hereinbefore admitted to have occurred was occasioned by reason of the careless and negligent conduct of any of defendant's employees other than the deceased, John Janoski, himself, it was the carelessness and negligence of co-employees who were engaged together with

the said deceased at the time and place of the accident in the same general work of repairing the machinery of defendant's coal-washing plant aforesaid, being under the same common master and direction, who were fellow-servants of deceased, and for the consequence of whose negligence this defendant is not liable.

Third: That the deceased, John Janoski, had been in the employ of the defendant company as a carpenter and general repair, and for a long time, and at many times prior to the date of the accident had worked upon machinery in defendant's coal-washing plant, and made similar repairs to those that he was engaged in at the time of the accident aforesaid; that he was thoroughly familiar and well informed as to the nature, character and condition of the machinery used in and about the coal-washing plant aforesaid; that he understood fully its manner of construction and methods of operation, and was familiar with all the risks, and all facts, circumstances and conditions surrounding the work of repairing the machinery aforesaid, and any of these facts, circumstances and conditions giving rise to, or causing or contributing in any way to the said accident hereinbefore admitted to have occurred, were facts, circumstances and conditions incident to, and necessarily connected with the deceased's employment as a carpenter and general repair man at defendant's Melmont mine, the risk and danger of injury from which the deceased, John Janoski, assumed when he entered upon and remained in the employ of the defendant company.

Wherefore, this defendant prays that the suit be dismissed and that it may go hence with its costs and disbursements.

B. S. GROSSCUP, and
W. C. MORROW,
Attorneys for Defendant.

[Verified.]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff and for reply to the answer filed herein,—

I.

Denies each and every allegation contained in the first paragraph of the further and affirmative answer by way of statement of new matter constituting a defense in said answer contained.

II.

Denies each and every allegation contained in the second paragraph of the further and affirmative answer by the way of statement of new matter constituting a defense in said answer contained.

III.

Admits that the deceased, John Janoski, had been in the employ of the defendant company as a carpenter and general repair man for a long time prior to the date of the accident and had worked upon machinery in defendant's coal washing plant and made similar repairs; and denies each and every other allegation contained in the third paragraph of the further and affirmative answer by the way

of statement of new matter constituting a defense in said answer contained.

Wherefore, plaintiff having fully replied to said answer prays judgment as in her complaint.

BATES, PEER & PETERSON,

Attorneys for Plaintiff, Office and Postoffice Address, 502 Equitable Bldg., Tacoma, Wash.

[Verified.]

[Title of Court and Cause.]

Judgment.

Now, on this 30th day of March, 1909, the above cause being on trial before the Court and a jury duly impaneled and sworn and the plaintiff and defendant having introduced their evidence and rested, the defendant moves the Court to instruct the jury to return a verdict for the defendant, which motion was sustained by the Court, and thereupon, under the instruction of the Court, the jury returned a verdict finding the issues in said cause in favor of the defendant, to which instruction of the Court the plaintiff excepted and the exception was allowed.

It is therefore by the Court ordered and adjudged, that the above-entitled action be and the same is hereby dismissed, and that the defendant recover of the plaintiff its costs and disbursements herein expended taxed at $.....

C. H. HANFORD,

Judge.

[Endorsed.]

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that on the 26th day of March, A. D. 1909, the above-entitled cause came on for trial before the above court and a jury duly impaneled:

Hon. C. H. HANFORD, presiding.

Plaintiffs appearing by Messrs. Bates, Peer and Peterson, their attorneys, and defendant appearing by Geo. T. Reid and J. W. Quick, its attorneys, and the following proceedings were had and testimony taken:

An opening statement was made to the jury by Mr. Peer. Defendant's counsel reserved its opening statement; whereupon the following testimony was taken:

[Testimony of R. C. Stockton, for Plaintiff.]

R. C. STOCKTON, a witness sworn in behalf of the plaintiff, being first duly sworn, testified as follows:

My name is R. C. Stockton. I live in the city of Tacoma. I am a teacher of manual training in the High School here. I made this model. (Model identified as Plaintiffs' Identification "A".) I made the model from measurements taken from the machinery in the mine of the defendant company at Melmont. It is constructed on a scale of one to five, except the distance between the center of the drive shaft and the upper one, which I had to foreshorten

(Testimony of R. C. Stockton.)

on account of the height it would have made. It would have been ten feet, otherwise. That does not affect the relative position of anything else. This model shows the arrangement of the upper platform except that the two posts on the right of the model are not as far out from the wheel as they are in the plant. Otherwise it is a correct model of the transmission wheel, tightener, friction clutch, pulley, platform, transmission rope, made from actual measurements and used in defendant's mine at Melmont. By throwing in the clutch on the small pulley at the lower part of the model and thus is the power transmitted to the big transmission wheel. If a break or parting occurs in the transmission rope and it becomes necessary to splice it, we lift the tightener shown on the model with a block and tackle, giving you the slack rope you want down below for making the splice. In making the splice you untwist the rope and twist back again, and in twisting back again it tends to make kinks in the rope until it passes over the shieve of the pulley. That kink would extend throughout the entire section of rope.

Cross-examination.

(By Mr. QUICK.)

I made this model at Mr. Peer's request, the defendant having given me written permission to make it. Mr. McDowell, the superintendent of the mine, told me the tightener was raised by a block and tackle arrangement. That is a pretty heavy wheel, all made of metal. It is a debatable question whether the

(Testimony of R. C. Stockton.)

tightener would take the kinks out of the rope as soon as it passes over the shieve of the pulley. I question whether it would when the rope was on that side. I never saw any splicing done. I never saw this particular machine in operation. I have seen machines like it. The platform was made on a scale of one to five, which would make the platform about forty-five inches wide.

[Testimony of John Urick, for Plaintiff.]

JOHN URICK, a witness sworn in behalf of the plaintiff, being first duly sworn, on oath, testified as follows:

Direct Examination.

(By Mr. PEER.)

I am working for the Green River Coal Company as a blacksmith. I was working for the defendant at Melmont on October 5th, when John Janoski was hurt. I was blacksmithing, helping around the machinery in all kinds of work. John Janoski was a carpenter, electrician, looked after machinery and certain parts of the work we helped each other in. He got hurt on Saturday between two and three o'clock in the afternoon. John and I were out in the blacksmith shop that day eating our dinner,—we were late to dinner,—when Hosko, the bunker boss and machinery foreman for the mine, came over to the blacksmith-shop and wanted us to splice the rope on the big transmission wheel. We went over to the bunker to do this. There was there at the time a fellow who was picking slate, a couple of

(Testimony of John Urick.)

Italians, George Dorke Hosko and I and John Janoski and Mr. McDowell came with us. When Janoski and I first came there we took the tightener up with the block and tackle. Mr. McDowell was there at the time. This tightener was taken up with a block and tackle to give slack on the rope, bring it down on the floor so we could splice it. We raised that up and the rope was not exactly on that side. We had to turn the wheel before we raised that up so that the rope came on the side so we could splice it. The part of the rope that needed splicing was not on the left side of the wheel but was further over, and you had to turn the wheel to get it where you could splice it. We then raised the tightener up, took the rope off there to go ahead with our splicing. While we were doing this the transmission wheel was moving a little. It pulled the rope out of our hands while we were splicing. We decided to put something in the wheel to keep it from turning around. Hosko, Mr. McDowell, Janoski and I were all there and we all said, "We got to block that wheel." We put a piece of pipe under the spoke in the big wheel on the upper platform. To loosen the rope we raised the tightener up. When the rope would come off here it would come down on the floor and we spliced it right there on the floor. We were putting the pipe in there (indicating the spoke of the wheel). John Janoski put the pipe in, and put the pipe right in this spoke here (referring to the spoke in the big wheel). He put the pipe right across here, maybe *right* feet long. The pipe was

(Testimony of John Urick.)

lying on the platform all the time. We were trying to put the groove in that side. Janoski put this pipe that was lying there through the wheel. At this time Mr. McDowell and Hosko were standing down below where Janoski was. There was nothing to prevent us from seeing what Janoski was doing. I saw Janoski put the pipe in. After Janoski had done that he came down on the floor and we commenced to splice the rope. It probably took half or three-quarters of an hour to splice the rope. McDowell was there all the time, from start to finish. After the splicing was done, Janoski went on top, loosened the tightener and let it down. I was underneath, holding the rope. I was standing right there (indicating platform on model directly under wheel), on the right side of the wheel. We put the rope here (indicating), after Janoski let the tightener down. We have to turn the wheel once or twice on the shaft before it tightens the rope up. Little kinks form in the rope, made by the splicing. After Janoski let the tightener down he went up to straighten the kinks, put the rope in the groove. He could not reach from below, had to go up. He straightened the kinks out so that when the wheel started the rope would run in the proper groove. If we did not do this it would tangle and tear everything. When Janoski was taking the kinks out above I was taking the kinks out down below, so the rope would follow in the groove. While we were doing this Hosko was walking over toward the picking table and he said "Watch yourselves" to George and

(Testimony of John Urick.)

the others at the picking table and down below in that part of the washer-house. After he had said that he stepped back toward the wheel and said to Mr. McDowell, "Are you ready to start up?" Mr. McDowell said he was and to ring the bell. When this signal was given Janoski was straightening up the kinks, had not got his work done, and was not ready for the thing to start. When Hosko rang the bell the engineer happened to be right near the clutch in the engine-room and threw it on quick, and the machinery started up, all at once. The pipe bent, went around, and hit Janoski on the head, and knocked him down on the floor where I was standing. Before McDowell told Hosko to start the machinery, no one asked Janoski if he was ready to have it started. At the time he was still working, taking out the kinks, and I was holding the rope from below. Janoski did not say that he was ready for the machinery to start. He did not say anything. Janoski struck on his shoulders on the floor, at a point at about the further right-hand corner of the lower platform, as shown on the model. After the machinery stopped, the pipe fell down at our feet, as McDowell and I stood there. (Pipe marked "Plaintiff's Identification 'B' " shown witness, who says that is the pipe.) There was a cut several inches long on the left side of his head, where the pipe had hit him. When he came down I noticed that Janoski hit with his shoulders instead of his head. His head was coming down first, but before he struck the floor he kind of turned around and

(Testimony of John Urick.)

hit with his shoulders like. The space was open from the floor to the platform and in his descent he had hit nothing until he struck the floor. I think that he was unconscious when he struck the floor. He was taken to the hotel, where he died at about ten o'clock the next morning, never regaining consciousness.

Cross-examination.

(By Mr. QUICK.)

Before Hosko started to pull the bell wire to start the machinery he said to the fellows at the picking table, which was twenty-five or thirty feet from the wheel, "Watch yourselves." When the tightener is raised up that takes the rope off the wheel and the slack drops down on the floor. There is tension on the pulley down below, and the rope is not loose on the big wheel. When we were splicing, the wheel kept turning a little, and pulling the rope out of our hands. The engine was running down below and the vibration of the engine caused the transmission wheel to turn. From where I was standing I could see Janoski on top of the platform. When you get through splicing the rope, the first thing is to put it back on the wheel before letting the tightener down, and Janoski first placed the rope back on the wheel and then let the tightener down. When the engine runs down below it makes the wheel run some. The wheel moves so you can hardly see it, but the rope on the wheel being tight the engine running below pulls it this way from the other end, and

(Testimony of John Urick.)

out of your hands. I do not know just how many inches the wheel would jiggle, but it moves some, and that is why we put the pipe in there. After the tightener was let down, or while Janoski was working with the tightener, Mr. McDowell told Hosko to go to the bunker, two hundred or two hundred and fifty feet away, and start the engine at the bunker. I know McDowell told him to do this, but I don't know whether Hosko went, or not. The engine at the bunker had nothing to do with starting the machinery around which we were working. Hosko came back from the bunker before he started the washer-house, over to where we were working. When the machinery started I was holding this rope to straighten the kinks out of it, so it would follow the groove. As soon as the machinery started I heard a rattle in the wheel, and saw Janoski coming down head first. I did not see what hit him, but there was nothing else to hit him except the pipe, as the space was open through which he fell. When Hosko pulled the signal wire it rang the bell in the engine-room below, and the engineer started the machinery. The engineer happened to be standing right by the clutch; he told me that himself, and besides I could see him from where I was, as there was an opening through which I could look down to the place where he stood. I did not see him throw the clutch on, but as soon as the bell rang the engine started. He happened to be standing right there and put the clutch on as soon as the bell rang.

(Testimony of John Urick.)

When Hosko asked if every one was ready, Janoski did not say, "Yes, all right." He did not say anything. I read English, but do not write English very much. That is my signature; I signed it. There was one thing in the statement I did not understand rightly until everything was signed up. The claim agent told me, "McDowell told Janoski to start this engine," but as a matter of fact McDowell did not tell Janoski to go up to the bunker to start the engine, for if he had gone to the bunker he would not have gone on top of the platform. I don't know as that is in the statement, but that is the way the claim agent wanted me to say. I did not read the statement myself, the claim agent read it to me. I was working at the shop and I had to let them fix it, otherwise I would have had to get out of the shop, the same as I afterwards did. I did not say, "After the rope was finished Hosko went to the bunker and started the engine there; he was gone about ten minutes." I did not say, "Janoski went to start the engine up," and if this is in the statement it is incorrect. When he came back Hosko asked the fellows at the picking table if they were ready. Janoski fell to the floor we were on, and if that is in the statement it is correct. The accident occurred about two or three o'clock in the afternoon of Saturday, October 5th, 1907. The statement you have in your hands was made a few days after the accident.

(Testimony of John Urick.)

Redirect Examination.

(By Mr. PEER.)

I do not know what is in my statement any more than what counsel has read to me. I did not take the statement in my hands after the agent had written it and read it myself, but he read it himself, while I was working in the shop. As I did not read it myself at all I do not know what is in the statement. When the claim agent was there I asked him if he put it in the statement that Janoski went over to the bunker to start the engine, or whether he meant Hosko went to start the engine. If he put it in that Janoski went to start the engine, it is wrong. If he has it that Janoski went to start the engine it is wrong as he did not do so, because he was on top of the wheel. The rope pulled away from us and we had to have something in the wheel so it would not pull the rope out of our hands, and I told the claim agent when he took the statement that I heard Janoski tell the boss Hosko to put a block in the fly-wheel. When Hosko came back from the bunker and asked if everyone was read, someone said, "Yes, all right; let her go." I did not tell the claim agent that it was Janoski who said this. Janoski did not say anything of the kind. I was busy at work in the shop at the time and did not exactly pay attention to it, and I do not remember whether the claim agent ever read that part of the statement to me, or not. I did not knowingly say to him, or anyone else, that Janoski made such a statement. The agent was writing it down himself and did not let me read it.

(Testimony of John Urick.)

The part of the statement is correct to the effect that the next day after the accident, looked at the platform around the wheel and saw where this pipe had hit when it went around in the wheel. The claim agent was trying to ask me if Janoski was drinking anything and asked if he was drunk. I said no. They wanted me to say that Janoski hollered that he was ready, and wanted me to say it, but I did not tell them that. They wanted me to say that Janoski had fallen off the platform instead of being knocked off and that in falling off the platform he had struck his head on another timber. When I was working over there when they took that statement I had to say what they wanted me to or quit my work. I never told them that Janoski said "All right; go ahead." The slate picking place was twenty-five or thirty feet to one side, from beneath the wheel. When Hosko told the rock pickers to look out, he was not right under the wheel but was to the side, toward the picking table, where the picker was, and after he had told the pickers to look out, or watch themselves, he came back toward the wheel and McDowell told him to start up.

Recross-examination.

(By Mr. QUICK.)

When the claim agent asked me if Janoski fell off the place himself, I do not think I said he fell off. I did not read the statement and I do not know how the claim agent put it in. I do not know whether or not he put it in the statement that Jan-

(Testimony of John Urick.)

oski was drunk. I do not know whether it is in the statement about Janoski being drunk, as I never read it. I do not know if there is anything in the statement about Janoski's falling off the platform voluntarily. The agent asked me that, though, in the blacksmith-shop.

(Statement marked Defendant's Identification I.)

I had to sign that statement because I was working for the company. They did not tell me I had to get out, but I know very well if I had not I would have been fired, the same as I have been. I am a blacksmith, and learned it while serving a two years' term in the penitentiary in British Columbia.

Redirect Examination.

I was not in the penitentiary for stealing or robbing, but licking a man that was not worth anything. The man I whipped was foreman of a mine, and I had some rabbits and pigeons and he had a hog that was eating people's chickens. Once I came from work in the afternoon and the hog had broken in the stable and I shot in and he got in a fight with me and that is why I served in the penitentiary.

[Testimony of George Dorke, for Plaintiffs.]

GEORGE DORKE, called in behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

I was working at the Northwestern Improvement Company's mine at Melmont at the time Janoski was hurt. I was picking slate or coal out of the rock

(Testimony of George Dorke.)

and shoveling them into the chute onto the rock pile. I had been there about two months and stayed there about twenty days after the accident. My working place was twenty-five or thirty feet out from and to one side of a point underneath the wheel, but in a northeasterly direction from the wheel, taking the place where the tightener is as a view point. I remember when the splicing of the rope was done the day that John Janoski was hurt. There were present during the time the splicing was being done John Urick, John Janoski, John Jacobson, Mr. McDowell, the superintendent, and Hosko the bunker boss. They were about half an hour at the work. I was working shoveling out rock, at my working place while they were splicing the rope, finishing my work about ten minutes before the splicing was completed. There were two Italians named Frank and Mike who were at work down below me on the ground, one pushing out to a rock pile the rock I had shoveled out, and the other shoveled out slack. There were wheels and chains that drive the pulley and hoisting chains located near their working places. This machinery was standing still while the splicing was being done, the same as the picking table and other machinery about which I was working. When I got through with my work I sat down on the edge of the table and waited for them to start. I did not go up where they were working. Shortly before the machinery started Hosko stepped over to the edge that is open where he could see down below in the

(Testimony of George Dorke.)

bunker, toward where I was and toward where the other boys were, below me. He said, "Watch yourselves," and I said, "All right." He was walking around doing something for a few minutes, I don't know what, and not walking toward the south end of the coal-bunker. He said, "Watch yourselves," again. He came in there to see down below and asked me for the other fellows, and I told him Frank was on the rock pile doing something, and he hollered out to Frank to come in, and Frank did so. After that he came down the third time and did not see all of us, as little Mike was down below yet, and he was going to ask for him and I told him he was not up yet. He was going to the south end again, and hollered out for Mike, who was working on the dumping pile, and he, Mike, was coming up the ladder to the south end, and little Frank answered for him. Hosko started over toward the wheel and asked McDowell whether everything was ready to start. McDowell said yes, he thought everything was ready to start. Hosko went and pulled the wire, stepped from the wheel up this direction to the southwest side to pull the wire which gave the signal to the engine-room. When he did that I turned myself to the table to do my work again when the rock came along, and I did not do any more than this when the engine started. Then I heard something drop, make a heavy fall. I turned around and saw Hosko run for the wire to stop the machinery. The Italians and I ran up and John Janoski was lying on

(Testimony of George Dorke.)

the floor, unconscious. He was shortly afterward taken to the hotel, where he died the following day. He was lying about seven feet to the left of the northwest corner post, as shown on the model, standing at the end of the model, where the tightener is, as a viewpoint. There were no timbers of any kind, and nothing but open space between where he lay and any part of the platform.

Cross-examination.

I was picking rock twenty-five or thirty feet away from the transmission wheel, about six feet below the main floor. From my working place I could see over the wheel below the platform. I heard Hosko say three times, "Watch yourselves." He was not by the machinery when he said that but was out toward us. The first time he called I guess he was about twenty feet toward the south end, toward the washing-table, coming toward the edge of the floor and washing-jiggers. I did not measure and cannot say just how far he was from me or how far from the wheel, when he said it. I heard him very distinctly. He was looking to see if there was anyone else there, where I was. I could hear him plainly and if Janoski was up on the wheel he could have heard if he had been up there. It was a few minutes before he called out the second time. The second time he said, "Watch yourselves," as loud as the first time. I heard him all right. I suppose the rest heard it the same as I did. It was maybe two or three minutes before he called the third time. I

(Testimony of George Dorke.)

answered him the first time he called. The last time he called the little Italian Frank answered. He was down on the floor where I was, about fourteen or sixteen feet from me and that much distance further from Hosko than I. He said, "All right." The third time Hosko gave us the call he asked for little Mike and little Frank answered for Mike, who was coming up the ladder. Then Hosko went toward the wheel and asked Mr. McDowell if everything was all ready. McDowell was standing by the rope at that time. I heard him ask McDowell if everything was all right, and McDowell said, "Yes." After McDowell said "Yes," the machinery was started. Janoski fell seventeen or eighteen feet and I heard him fall on the floor.

Redirect Examination.

When Hosko gave the second call I was starting toward the south and a greater distance from the transmission wheel than when he called the first time. He was looking in our direction, toward the picking table. The first time he called to me he was a little way from the rope, toward our table. The second time he was between the wheel and the south end of the building. When he came down the second time he asked me where the other fellows were. I told him Frank was on the rock pile below, so he went and hollered out of the opening in the side of the building. When he made the third call Hosko was just about at the end of the building, coming down from the stairway. He was inspecting or

(Testimony of George Dorke.)

glancing over something. He was about fifty or sixty feet from the big wheel when he called the third time. The third time he asked for little Mike and he was not there and Hosko was going to call out again but he saw little Mike coming up the ladder and Frank answered for him "All right," so Hosko did not call again. He then went down to the rope and asked Mr. McDowell if everything was all ready, and Mr. McDowell answered him "Yes," so he just stepped over and pulled on the rope. I did not see him pull the rope, but just turned to the table, because there was some coal on the screen. Just when that started I heard something fall and turned around to look, and saw Hosko running back to the bell wire.

The COURT.—I will take this opportunity to indicate to the jury a little bit the art of weighing testimony. This witness on the cross-examination apparently seems to have Hosko located somewhere near this wheel, on the platform. Mr. Peer in his examination has questioned him until he seems to have got him fifty or sixty feet away. A jury, in weighing testimony, should make allowance for the firmness with which a witness makes his statements and adheres to them, and they should also make allowances for the manner in which witnesses may be led by the skill of counsel in framing questions. A witness who out of his own mind, in his own words, states a fact, is giving testimony which a person accustomed to weigh evidence will find usually of a

(Testimony of George Dorke.)

great deal more value than the testimony of a witness who merely assents and acquiesces in what counsel have framed up in their own words. That is what is called "leading," and an attorney is not allowed to lead his own witnesses. The other side has a right to lead him and cross-examine him, because that is a means of testing the accuracy and degree of firmness and positiveness in the mind of the witness in giving his testimony. I am going to examine this witness and endeavor to find out, if I can, approximately the distance that Hosko was when he gave this warning.

(Questions by the COURT.)

Q. How wide is this courtroom, how many feet wide? You have not measured it, I do not expect you to tell precisely but how wide does it look to you?

A. About fifty feet.

Q. You think it is fifty feet. Well, now, using that as a means of comparison, was Hosko when he gave this warning and called out to the men to watch, was he as far away from that platform where Dorke was as this room is wide, or was he further or less?

A. The last time—

Q. It was less distance?

A. The first warning he gave us there was only a short distance, he was there by the rope, it was just about the time when they got through with the work. The second time he was about in the middle distance of the building. The third time it was way down from the south end of the building.

(Testimony of George Dorke.)

Q. The second time do you think he was further away than this building is wide? A. No.

Q. Was he as far away as half the width of this building?

A. Yes, and probably a little better.

Q. And the third time further away?

A. Yes, right from the south end of the building.

Q. Is this room wider across that way than it is from that door to this one?

A. It looks more like a square building to me.

Q. Looks square to you? A. Yes.

Q. You said there was an interval of two or three minutes between the time he made these different calls. Do you mean a short time, or do you mean two or three minutes sixty seconds long? Have you got an idea of about how long three minutes is?

A. Yes.

Q. How many minutes is it since I began talking to you? A. I don't know.

Q. Do you think it is two or three minutes since I began this talk?

A. I should judge something like that.

Q. Was there as much as that interval between the different times Hosko made these calls? Or was there more or less time?

A. Either more or less—all those three calls—

Q. How do you remember; do you think it was less, about the same time, or longer?

A. I thought it was between two or three minutes' time—of course I cannot say—I cannot judge if it was a minutes' time—

(Testimony of George Dorke.)

Recross-examination.

When Hosko called the second time he was about half the length of the building from me, the building being about as wide as this room is across, and he was just about the same distance from me as he was from the wheel. The first time he called he was standing close to the edge of where you could see down below well and right next to the wash-pans. When he came back and asked McDowell if it was all right and McDowell said yes, he was right by the wheel.

[Testimony of Mrs. Josephine Janoski, for Plaintiffs.]

Mrs. JOSEPHINE JANOSKI:

Direct Examination.

I am the widow of John Janoski and live at Renton, Washington. This little girl, Agnes, is the daughter of myself and John Janoski and is eleven years old. He was thirty-seven years old at the time he was killed and was earning close to one hundred dollars a month. He was a good husband and father and a hard, steady-working man. At the time he was killed we had our own little home at Renton, where he had formerly worked, and I was living at Renton. While employed at Melmont he came home as often as he could. I got a telegram at seven o'clock in the evening and I could not go there that Saturday because there was no train going. Sunday I took the train and did not get there until 10:30 at

(Testimony of Mrs. Josephine Janoski.)

night, and he was dead when I got there. The little girl went with me up to Melmont.

Cross-examination.

John Janoski used liquor some, but knew how to use it. He got drunk sometimes, but when do he never went to work.

Plaintiffs' Exhibits "A" and "B" offered and received in evidence.

Plaintiff rests.

[Recital Relative to Motion for Nonsuit, etc.]

Defendant interposed a motion of nonsuit on the ground that the evidence of plaintiffs is not sufficient to entitle them to recover as against the defendant, for the reason that they have not proved the allegations of the complaint, and for the further reason that there is no evidence of negligence on the part of the defendant.

The COURT.—I am unable to grant the motion on the ground upon which it is based. The rule is undoubtedly true that where the evidence leaves a degree of uncertainty as to the source or means by which an injury was inflicted and there is ground for the theory—for different theories,—as to the cause, some of which would render the defendant liable, and some would not, that there the plaintiff has failed to meet the burden upon him to prove that the injury is caused by the defendant. But whether this injury was caused by the gas-pipe or piece of pipe striking him on the head, or whether he was thrown while in the act of attempting to withdraw the pipe from

its position between the spokes, or whether he had a sudden attack of vertigo and fell, is not an inquiry that we have to go into here, because on that evidence there is abundant ground to find that the injury was caused by the application of force. To start that wheel when the gas-pipe was there as a bar to prevent its operation, was a dangerous thing to do, and if we should go into the realm of conjecture and conjecture that this man might have been killed by a fall and that he fell because he had vertigo there would be abundant ground for finding that the shock of the occurrence had produced the vertigo at that time, and I would leave it to the jury, on a theory of that kind, if I had to.

Defendant's counsel said there was no evidence of negligence on the part of the defendant. There was negligence. It was a negligent thing to start that machinery until the bar had been withdrawn.

The case will have to turn on two questions: as to whether the defendant is responsible, by the rule of respondeat superior, by the negligence of the one who caused that to be done, and the other question is whether the deceased was guilty of negligence or contributory negligence. Those are grounds that are not stated in the motion, and I cannot base a ruling except what is stated in the motion. I deny the motion.

Exception.

Witnesses for the Defense.

[Testimony of J. W. McDowell, for Defendant.]

J. W. McDOWELL, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

I am the superintendent of the Melmont mine and have been for seven years. I was acquainted with John Janoski in his lifetime. I am familiar with the piece of machinery represented by the plaintiffs' model here in the courtroom. I have been present several times when the rope was spliced, or a new rope was put on the wheel. The tightener and big balance wheel, a part only of the latter of which is shown, would weigh from twelve hundred to fifteen hundred pounds. It is raised by a block and tackle. When the rope is being spliced it may have a little twist in it when lying on the floor, but the minute the rope is put in the groove and this big balance wheel let out it straightens out. The transmission rope is manila inch and a quarter. I yesterday made a test of the speed of the transmission wheel. Mr. Angwin, our machinist, E. M. McDowell, and George Hosko were present. I made a test with the speed indicator and the others were witnesses and saw it made. When the rope tightener is off and the rope taken off the wheel for the purpose of splicing, you can move the big wheel with about four or five men, but it would not move by the work necessarily performed in the splicing of the rope. I have never

(Testimony of J. W. McDowell.)

known any blocking of the wheel to be done during the splicing of the rope. I did not think it necessary. I was not present when they began the splicing of the rope the day Janoski was killed, but was there before they got through. When I got there John Janoski, George Hosko, John Jacobson, and John Urick were working on the rope and had the rope down. I stayed there after the machinery started and was there when Janoski was hurt. I did not know that the gas-pipe or anything else had been placed in the wheel. After the rope was spliced Janoski went up on top to let the tightener down. It is on the floor, close to this little wheel, behind the big one. He let the tightener down and pulled the block back up. The man down below let the tightener down on the block. After the tightener was down and the block pulled up to place, the back balance down below was put on by the washer boss Hosko. When that was done Hosko went over to the bunker to start the machinery there and was gone ten or eleven minutes. When he came back he said, "Ready to start"? and some one on the top floor said, "Yes." I do not know if it was John Janoski said "Yes." It sounded like his voice. "Let her go," he said. Hosko called out two or three times "Watch yourselves" or "Vatch yourselves"; he could not say it in English. Then he went up to the bell rope and range the machinery up. I was standing directly under the wheel when he did this, between the two ropes. I have marked a square with a lead pencil on the floor on the model underneath

(Testimony of J. W. McDowell.)

the wheel where I was standing. John Urick was standing facing me about six feet away. After Hosko said "Watch yourselves" he walked over ten or twelve feet to the bell rope and pulled it. He said "Watch yourselves" loud enough so that the pickers at the picking table all said "All right." They were fifty-six feet away. I measured the distance yesterday. As soon as the machinery started there was a racket in the wheel. I was standing directly under the wheel, and stepped out. *There* wheel was still revolving. I looked up ten or twelve seconds, and Janoski came down head first. I did not see anything strike him, only saw him coming, directly through the hole, just right over the edge of the sidewalk around the wheel. He struck on his head on the floor. I saw him when he first started to come, when his head first started to come through I was looking right up. I should judge from the time the wheel started it would be thirty or forty seconds before he fell.

The COURT.—Did he fall through the slot that the wheel worked in, or over the edge of the platform?

A. He fell down through here, this four feet from this end of the wheel, through here (indicating the space between the beams at the end of the platform around the big wheel).

The space where he came down through was about two feet and four or five inches square. There was a slight abrasion on his head, skin deep; It was the

(Testimony of J. W. McDowell.)

only mark I could see. He remained conscious about a minute and a half, during which time he repeated after me what I would say and seemed dazed. He was taken to the hotel and never regained consciousness, dying the next morning. After he was at the hotel Dr. Robinson examined him and found he was ruptured. His rupture protruded as large as your two fists. He wore a steel truss. On the left side of his head there was a slight cut, but I noticed no other bruises. This piece of gas-pipe weighs ten or twelve pounds. Defendant's identification 2 is a photograph of the Melmont bunker, washer, power-house, and elevators, taken about a year ago, when the conditions shown were practically the same as at the time Janoski was killed. The transmission wheel is located up in the attic, close to the roof, of the high building shown on the photograph. The coal-bunkers are up across the track. The pickers are located on the south, in this corner, way down below this floor, marked on the photograph with a lead pencil. Persons at the pickers cannot see men working splicing at the transmission wheel on account of four nut coal jigs being in the way. A person at the pickers cannot see a man standing where the bell rope for signaling, the engine is placed, on account of the nut coal jigs being between him and the bell rope. You would have to walk out ten or twelve feet on either side, away from the bell rope, to see the picking table.

(Defendant's Exhibit 2 offered and received in evidence.)

(Testimony of J. W. McDowell.)

This pipe is so black and sooty on account of the fumes and dust of the coal and of the washer. It has no more than simply dust upon it that I know of. It has laid in the washer ever since the accident. It has not had fire on it, or been burned. It has been in a corner of the washer in the same place it was when I showed it to you, Mr. Peer. I told you, Mr. Peer, at the time you were up there at the plant, that when the pipe fell down on the floor, at the time of the accident, there was blood and hair on it. About October 10th, five days after the accident, I had a conversation regarding the accident at Melmont in the washer-house with Mr. Kukalis, a brother in law of Mrs. Janoski. In that conversation I do not remember saying to Mr. Kukalis that Hosko asked me if everything was all right (referring to the time before he started the engine). I did not tell Mr. Kukalis at that time that after Hosko had asked me that question I said, "All right." I did not tell Mr. Kukalis at that time that after I told Hosko "All right" he stepped over to the bell cord and pulled the bell and started the machinery. I did not tell Mr. Kukalis at that time that, as a matter of fact, I had momentarily forgotten that Janoski was on the platform. Hosko was the washer boss and had charge of the washer and men on the washers. He is working for the company now. He was away for a while, left about four months ago. He was getting two dollars and sixty cents when he left. He went to Montezuma to work and returned to work for us

(Testimony of J. W. McDowell.)

about a month ago, and he now gets ten cents more a day than when he left.

Redirect Examination.

It is not dangerous to a person upon that platform to have the machinery start. The sidewalk is four feet wide and you can walk all around the wheel. You can go up and go around the wheel when it is in motion, at any time. When you pull the clutch off that starts it, to move the wheel in motion, you do not have to stop the engine itself.

[Testimony of E. M. McDowell, for Defendant.]

E. M. McDOWELL, a witness called in behalf of the defendant, being sworn, testified as follows:

Direct Examination.

I am a brother of the superintendent and am engineer at the Melmont mines. I have worked there three different times, it being four or five years since I first started. I am acquainted with John Janoski, and remember the day he was killed at the mine. I saw him on top of the platform that day. I went up to see what they were doing with the rope and the washer boss and John Jacobson were there ready to pull up the tightener with the block and I helped them do that. After it was pulled up, while the washer boss was fastening the end of the rope attached to the block to the end of the tightener up there, Janoski picked up a piece of pipe and started to block the wheel. I told him it was absolutely unnecessary to block the wheel but he never paid any

(Testimony of E. M. McDowell.)

attention to me. After the washer boss tied the rope I heard him tell Janoski not to block the wheel. I left immediately after, and went down below. I was not there when the accident occurred.

Cross-examination.

Janoski did not pay any attention to me when I told him not to block the wheel. When I had this conversation with him Hosko, John Jacobson, John Urick, were all that a remember of being on the floor at that time. The pickers were close by on the floor below.

Redirect Examination.

The engine is running sixteen hours out of twenty-four, almost all the time, with the clutch out, on this rope. The lower clutch is out sixteen hours out of twenty-four and the engine runs all the time. That wheel never moves. The running of the engine has never to my knowledge started this machinery automatically.

Recross-examination.

I never knew of the clutch jiggling a little, catching a little, and turning the wheel while they were splicing.

[Testimony of George Hosko, for Defendant.]

GEORGE HOSKO, a witness called in behalf of the defendant, being sworn, testified as follows:

I work at Melmont. It is five or six years since I started working there. I used to feed coal in the washer and then became washer boss and have been

(Testimony of George Hosko.)

washer boss for three years. I saw them put in four new transmission ropes at different times and have seen the old rope spliced frequently. We never blocked the wheel in splicing rope. The wheel never moves any while we are splicing. The big wheel is started by throwing the clutch in below. It never starts any other way. I was there when Janoski was killed. On that occasion with regard to the blocking of the wheel, Janoski said "Hold on, I am going to block the wheel." I told him, "No, no need to block the wheel." We spliced three ropes and never blocked the wheel, not necessary to block the wheel. I know he put the pipe in the wheel all right. I saw the pipe fall down. He did not take the pipe out of the wheel when I told him to do so before the splicing began. I did not see which side he put the pipe in at. After the rope was spliced we let the tightener down, and Janoski was sent up to take the block out. I was going to stay right on the floor, and the block is close to where they were splicing the rope. Janoski himself when up on the platform. When the tightener was down and the block taken out and hung on a post and everything ready I went over to the bunker to start the machinery there. I was gone about ten minutes. When I came back from the bunker I asked everyone, "All right"? "Yes, all right." I hollered twice "Watch yourselves." I then started the washer. I stayed close to the bell. I heard a racket and struck the bell again to stop the machinery and it stopped. I did not see Janoski

(Testimony of George Hosko.)

fall, but after the machinery was slowing down I saw the pipe fall. Defendant's Exhibit 3 is my statement made to the agent for Mr. McDowell a few days after the accident. It is the only statement I ever made, for Mr. McDowell. Referring to the time Janoski was at work with the tightener and block, in this statement I said, "Janoski, watch yourself; when you fall down you kill yourself." He said he would not be hurt.

Cross-examination.

When I told Janoski to look out and not fall, it was when he was going to take the block out and hang it on a post, after letting the tightener down. When the rope broke I went over to the blacksmith-shop to get Janoski and Urick to fix it. When we started at the work, John Jacobson, John Urick, John Janoski and I were there. Mr. McDowell, the superintendent came a little later. I was gone over to the bunker to start the little engine about ten minutes. When I came back John Urick, Mr. McDowell and Jacobson were there on the floor close to the rope. I said, "Well, is it all right?" I asked this of McDowell, the boss. McDowell said it was all right. Urick told me, too. When McDowell told me it was all right, I hollered for the men to "Watch yourselves, everyone." I called to everyone to watch out. I called to the rock pickers "Watch yourselves." I hollered this twice. I said "Watch yourselves. I am going to start the washer." Then I pulled the cord. Right away I heard a racket in

(Testimony of George Hosko.)

the wheel and stopped the engine as quick as I could. A day or two afterward I made a statement in the bunker. I made the statement that is here, in the bunker. John Jacobson, and Mr. McDowell, and the claim agent of the company were there. It was during my working hours and I was working all the time. Someone else did the writing and I signed it. I made one statement at Mr. McDowell's house, too, two or three days after the accident. Mr. McDowell went over there with me. This statement was taken down on the typewriter by Mr. McDowell's clerk and when he got it written I signed my name with my mark. I do not remember if I said in the statement at McDowell's house that McDowell was the man that said "All right." The statement I made at that time, however, was the way it ought to be. I remember now that McDowell told me it was all right and that is what I said that night to Mr. McDowell at his house. I talked to Mr. Kukalis at Melmont four or five days after the accident. I told him about how it happened at that time. I know Janoski went up to take the block out. I did not tell Mr. Kukalis that before starting the engine I did not notice Janoski was up on top. I never heard Janoski say anything before I started the engine. I heard Urick say all right, McDowell also said all right. I never heard anything from John Janoski, and I never told anyone that John Janoski said, "All right." That is what I told you, Mr. Peer, when you were up there at Melmont. I told you I never heard any answer from John Janoski, I remember at the time that I

(Testimony of George Hosko.)

and Jacobson talked to you, Mr. Peer, about it, when you were at Melmont, in August. I told you, Mr. Peer, at that time, that I had been away to start the little bunker, and when I came back, Mr. McDowell told me it was all right and I supposed it was all right. We never blocked the wheel, at all. The rope that was on the wheel at the time was a new rope. It had been spliced three or four days before Janoski was killed. When we spliced the rope at that time, I don't remember whether or not John Urick put the pipe in to block the wheel. I did not tell George Dorke the other morning, here in Tacoma, that I had blocked the wheel once myself with a stick.

[Testimony of John Jacobson, for Defendant.]

JOHN JACOBSON, a witness called in behalf of the defendant, being sworn, testified as follows:

Direct Examination.

I live in Gig Harbor and have a ranch there. I formerly worked at the Melmont and was doing so when John Janoski was killed. I was working at the transmission wheel at that time. I helped them pull the tightener up before the splicing began. I had helped splice ropes a couple of times before. I have also helped them put in a new rope, the one they are now using. Kinks never got in the rope from splicing it. The wheel cannot turn, and I never saw it wiggle any when the transmission rope *if* off. After the rope was spliced, Hosko went up to the bunker to start the machinery and was gone ten or

(Testimony of John Jacobson.)

eleven minutes. When he came back he asked if it was all right to start. I heard some one, I did not notice who it was, say it was all right. When someone said it was all right, Hosko went to the bell string. Before he started the bell, I heard him say, "Watch yourselves," twice. He said it loud enough that Janoski could hear it. He was closer to Janoski than he was to the pickers down below. I did not notice that the gas-pipe had been put in the wheel. I helped all the time they were splicing the rope.

Cross-examination.

At the time of the accident, I attended to the jigs and was washerman's helper in washing the coal. I know Mr. Kukalis and remember his coming up to Melmont three or four or five days after the accident. I do not remember that in a conversation I had with Mr. Kukalis at that time, I told him that when Hosko said, "Watch yourselves" he was directing his remarks to the boys at the picking table, and to the Italian boys further down below. I remember he pulled the bell string, but do not remember his going away and do not now remember his saying, "Watch yourselves," to the boys down below at the picking table. He said, "Watch yourselves" before he got to the bell string, and when he got to the bell string he said it again. The first time he was closer to the rope. I guess the boys down below noticed he was talking to them for they said "All right." When he pulled the wire I was standing at the steps to the jig, about ten or fifteen feet from the bell wire.

(Testimony of John Jacobson.)

The bell wire is twelve or fifteen feet from the transmission wheel. I stayed just at the side, a little bit up this way from the bell rope, between the bell wire and the wheel. I do not remember that about October 10th, after Janoski was killed, I told Mr. Kukalis that when Hosko said "Watch yourselves" he was talking to the pickers down below. I cannot tell who it was that said "All right." I do not know where it came from. I quit the company's employ three months ago and live at Gig Harbor. I made arrangements to come to your office, Mr. Peer, to see you two or three times, and did not get there. I said I would come, and made arrangements to come one day. I was on the boat and a man wanted to see me and I got off the boat again. That man was the claim agent, and then I did not get to come to see you after that.

[Testimony of C. H. Clark, for Defendant.]

C. H. CLARK, a witness sworn in behalf of the defendant, being sworn, testified as follows:

Direct Examination.

I am a carpenter at Melmont, for the Northwestern Improvement Company. I have worked there about a year and am familiar with the transmission wheel shown in the model, having worked around it a great many times, taking out broken strands on the old rope. I have also taken the old rope off and put a new one on, and spliced new ropes twice. It is not necessary to block the wheel to keep it from moving, in doing this work. I could not state how

(Testimony of C. H. Clark.)

much force it would take to move the wheel when the rope is off, but I don't think there could enough men get ahold of it to move it. I had six men helping me when I took the old rope off and put a new one on. I had to fasten the strands off, to splice, so that I could get that slack, and there were six of us, and the rope was let fall and we had to pull it back. There were six of us and six pulled on the rope, and we could not move it, and had to put the rope back on the wheel in order to move it back. There is not the least danger of the wheel jiggling back and forth in the splicing of the rope.

Cross-examination.

We did not move it at all with the rope off. There is no danger of the wheel moving at all while the splicing is going on and the engine below is running. I never knew that to occur. It could not occur with the character of the friction pulley we had down below. The clutch would burn out before it would move. I never blocked the wheel when we spliced, and never took any preventive, and there was no reason for any to keep the wheel from moving when you splice. The only thing we did was to throw the clutch out. Hosko has fixed the rope once or twice and he never used anything, and I have done it myself several times. I told the gentlemen who made the model, in a conversation on the train, that if it was necessary to take some precaution in order to ensure the wheel standing still while splicing, it could easily be remedied by stopping the engine and

(Testimony of C. H. Clark.)

taking the tension out of the clutch. It is not possible for the shoes on the clutch that rub up against the inner part of the felly of the friction pulley to catch and drag sufficiently to move the wheel. I did not tell Mr. Stockton in that conversation on the train that that was what had happened. I did not tell him that there was something wrong with the clutch or friction pulley and it occasionally moved around, and on that account they had blocked the wheel. I did not, in that conversation, tell Mr. Stockton that I would not even take chances with blocking the wheel, but would go down and take the bolts out so that the friction could not rest against the felly of the wheel.

Redirect Examination.

When we were putting on new rope or splicing the rope, we never did anything with that clutch down below. There is no danger whatever in the rope kinking when we are splicing, and if it did kink there would be no bad effects whatever. It would not be necessary to have a man up on top to take the kinks out before starting the wheel.

Recross-examination.

I am still with the company. The clutch used is an internal and external clutch.

[Testimony of A. D. Angwin, for Defendant.]

A. D. ANGWIN, a witness in behalf of the defendant, being sworn, testified as follows:

Direct Examination.

I am a machinist for the Northwestern Improvement Company at Melmont, and have been for the

(Testimony of A. D. Angwin.)

last seventeen months, and have worked there three and a half years altogether. I am familiar with the machinery there represented by this model and have worked on the transmission rope splicing it four or five times. I never found it necessary to block the wheel or put anything through the spokes in doing that work and while doing the work, the wheel never move nor did the rope ever kink. If it would kink, you could just twist it and take that kink out of it. The rope tightener might not take the kinks out altogether, but if you would take it apart before you drop the tightener and also straighten it out, you could take it out in that way. I made a speed test of this wheel yesterday with a speed indicator.

Q. Tell the jury what is the speed of that wheel when in operation?

Objected to, the test having been made only yesterday, since the occurrence of the accident, and would not be material as to what it is now.

(Objection overruled. Exception.)

A. Ninety revolutions per minute. The wheel is ten feet in diameter, and the rope is inch and a quarter manila transmission.

Q. Did you make any test yesterday to see if the wheel would move when it was left standing?

(Objected to for the same reason. Objection overruled. Exception.)

A. Yes, I nailed a piece of board across the two main timbers in front of the wheel and took a piece of chalk and marked across the rim of the wheel and we stayed there an hour, George Hosko, E. M.

(Testimony of A. D. Angwin.)

McDowell and myself. The wheel did not move one-sixteenth of an inch, had not moved any that you could notice.

I know where the pickers are, and a person at the pickers cannot see other men working under the wheel splicing rope, because there is plank between them. There is a floor that they are underneath, ten or twelve feet it would be, and you cannot see through it. The washer is also between them and the bell wire, and a person at the picking table cannot see a man when he would signal the engineer to start the engine.

Cross-examination.

I went there about November 15th after Janoski was killed, and have been there ever since. I do not know particularly whether or not the clutch down below and the pulley was in the same condition when I made the test yesterday as when Janoski was hurt. The only thing I know about that, is that the friction was in good condition when I left there in June and in fairly good condition when I went back in November, after the accident. I had gone six months, from June to November.

Redirect Examination.

I had worked for a long time prior to June preceding the accident and came back in November after the accident, and the machinery was in the same condition when I came back as when I left.

Defendant rests.

REBUTTAL.

[Testimony of George Dorke, for Plaintiff (Recalled).]

GEORGE DORKE, recalled, testified as follows:

Direct Examination.

At the time Hosko and I were at McDowell's home in Melmont, two or three evenings after Janoski was killed, Hosko said that when he said "Watch yourself" he was talking to the rock pickers. He also said that when he said "Watch yourselves" he was not addressing Janoski et al. He also said that at the time he was starting the engine he did not think or know anything about Janoski's being up on the platform. At the time I was at Hosko's home in Melmont on the 13th of last December, he made these same statements to me that he made at McDowell's home two or three evenings after Janoski was killed. When Hosko asked if they were ready it was not Urick who said "All right, go ahead." No one said this except Mr. McDowell, the superintendent. Janoski was hurt on Saturday, and the rope was also spliced on the Wednesday before, of the same week. I was working at the same place on that occasion, but had nothing to do at the time around the picking table and was up around where the men were at work splicing the rope. At that time I heard someone make the remark that the wheel was supposed to have been blocked, and I think it was Hosko himself who made the remark. This was after they started to splice the rope; on Wednesday prior to the accident to Janoski on Saturday.

(Testimony of George Dorke.)

In a conversation with Hosko here in Tacoma on the first day of the trial of this case he told me that when he spliced the rope at a time prior to the time when Janoski was killed, he, Hosko, himself, blocked the wheel with a stick of wood. McDowell, the engineer, the brother of the superintendent, was not there about the place where they were splicing the rope at the time Janoski was hurt.

Cross-examination.

I was down at the edge of the picking table all the time that day that Janoski was hurt and was not up at the wheel at all.

[Testimony of John Urick, for Plaintiff (Recalled).]

JOHN URICK, recalled, testified as follows:

Direct Examination.

When Janoski was raising up the tightener with the block, and when he put the pipe in the wheel, McDowell the engineer, was not there at all and did not tell Janoski not to put the pipe in, as he has testified. He was not about there at all the day Janoski got killed, and was not there from the time we started the splicing until after Janoski was hurt. This same rope had been spliced on the previous Wednesday of that same week. John Janoski, Hosko and I did the splicing. McDowell, the superintendent, was not there when we started splicing the rope on Wednesday, but came when we were about half through. The wheel was blocked that day with the same pipe that it was when Janoski was killed.

(Testimony of John Urick.)

I put the pipe in myself, and put it in the same way that Janoski put it in the time he got hurt. I took the pipe out of the wheel myself and McDowell was there when the pipe was taken out and when the machinery started up again. Hosko started up the machinery on the order of McDowell. The day Janoski was hurt, neither Hosko, nor McDowell, the engineer, or anyone said anything to him about not putting the pipe in the wheel. I started to work there March 1, 1907, and worked until February 8, 1908. The same old rope had been on all the time until a week before Janoski was hurt, and had never been spliced while I was there. I was there when this same rope was spliced after Janoski was hurt, and while I held the rope I did not do the splicing. The engine down below was standing still while we were doing the splicing at that time. At the time Janoski was hurt, the engine was running all the while. When Hosko asked if everything was ready before he pulled the wire, McDowell said it was all right and I said it was all right, because McDowell was there and said so.

Q. To see that we understand each other, I will ask you the question again. At that time, after Hosko had told the boys to "Watch yourselves," as he said he did, after he said "Watch yourselves" and came back and asked if everything is all right, who said, "All right, go ahead"?

A. McDowell and I said it.

Q. You said it and McDowell, both?

A. Yes.

(Testimony of John Kukalis.)

Q. I will ask you if at that time Hosko said "Watch yourselves. I am going to start the washer"?

(Objected to as incompetent and not proper rebuttal. Objection sustained. Exception.)

[Testimony of John Kukalis, for Plaintiff.]

JOHN KUKALIS, a witness called in behalf of plaintiff, being sworn, testified as follows:

I am the brother in law of Mrs. Janoski. I went to Melmont and talked to Hosko and McDowell and Jacobson three or four days after John Janoski was killed. In that conversation Hosko told me that when he said "Watch yourselves" he was talking to the pickers and not to Janoski. He also said that he did not think anything about Janoski's being on the platform when he started the engine. He also said that McDowell was the one who said "All right, go ahead," and he, Hosko, asked if they were all ready. In the same conversation at that same time Mr. McDowell told me that for the minute he had forgotten that Janoski was put on the platform, and that when he heard the engine start he forgot all about that Janoski was up there.

[Testimony of R. C. Stockton, for Plaintiff (Recalled).]

R. C. STOCKTON, recalled, testified as follows:

Direct Examination.

I know the pulley was a friction clutch pulley. I had some conversation with Mr. Clark coming down from Melmont on the train.

(Testimony of R. C. Stockton.)

Q. I will ask you, in a friction pulley, such as that is admitted to me, whether or not when the clutch is thrown off there is any possibility of that wheel budging or starting a little bit, and if so, what would it be caused by?

(Objected to as incompetent and immaterial and not within the issues of this case, and not rebuttal. Objection overruled. Exception.)

A. If the friction clutch was not in good order and was not set properly, was too tight, there is a possibility of its catching in a small part, even though the machinery that it would turn would be heavy, but the clutch is made correspondingly heavy. An example of the same might be seen in the T. R. & P. shops here in the city.

Q. Then you say, even though the clutch is thrown off, and the power is thrown off, it is possible, unless the pulley and clutch and all are in perfect repair, for that to budge some, and catch?

(Objected to as incompetent and immaterial and not rebuttal. Objection sustained. Exception.)

(Defendant moved to strike out the former answer of the witness to the former question, for the reason that same is incompetent and not within the issues of this case.)

(Motion denied.)

Q. If that clutch down there, and the mechanism of that pulley which I do not understand, but which I think you do, is not in repair, is there danger of that thing budging even if the power is off?

(Testimony of R. C. Stockton.)

(Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception.)

The COURT.—The real objection to this is that you are going off on a side issue. You have testimony to the effect that the wheel moved, and they have rebutted by proving that it could not. If you go into the details of the machine it is going off on a side issue.

In this conversation that I had with Mr. Clark he made the statement that if he was afraid of the thing he would take no chances with it, he would go downstairs and loosen the bolts on the friction clutch. He said, "That is the only safe way." The subject of our conversation was the accident in general. He would loosen the bolts so that it would be absolutely impossible for that to catch on it, the friction clutch to catch the pulley. If the clutch and pulley were not in perfect condition there would be a possibility of its catching there, which would exist even when the clutch is off.

Cross-examination.

This is very heavy machinery. If the big wheel, the transmission wheel, should start by reason of the friction clutch coming in contact, the gas-pipe would double up and not prevent the wheel from going, if the full force of the power was applied, but if just glancing, just a little catch, it would not necessarily bend the pipe. I noticed the clutch down below and the handle, and that when the superintendent turned it on, while I was there, it was in apparently good condition.

(Testimony of R. C. Stockton.)

Redirect Examination.

I noticed when Mr. McDowell moved it off, that is, when he moved the clutch clear back, he moved it beyond the notch, and the thought occurred to me that one could move it beyond the notch, I don't know as it would have any effect.

Recross-examination

If it went beyond the notch, when it jarred back, it ought to drop into the notch.

[Testimony of Mrs. Janoski, for Plaintiff (Recalled).]

Mrs. JANOSKI, recalled, testified as follows:

Direct Examination.

I was born in Eastern Illinois but have lived in the State of Washington for twenty-nine years, and have lived in Renton, three years, going on four. John Janoski was born in the old country, but came here with his parents when he was three years old. His parents lived in Eastern Illinois and he himself became a citizen of the United States.

[Recital Relative to Testimony, etc.]

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause. Both parties rested; whereupon the counsel for the defendant moved the Court to instruct the jury to find a verdict for the defendant upon the following grounds:

[Motion for a Verdict for the Defendant.]

1. That the evidence fails to prove facts sufficient to sustain a verdict in favor of the plaintiff.

2. That the evidence fails to show that the injury was occasioned through the fault or negligence of the defendant.

3. That the evidence shows that the injury was occasioned by the negligence of the plaintiff which contributed to the injury and was the proximate cause thereof.

4. That the evidence shows that the injury was occasioned through the negligence of the plaintiff in failing and refusing to obey the orders of the washer boss in placing an obstruction in the transmission wheel; and

5. For the reason that the plaintiff failed to exercise ordinary care and caution for his own personal safety.

After the argument and before the Court charged the jury, it rendered an opinion as follows:

[Opinion.]

By the COURT.—Assuming that Mr. McDowell was the vice-principal, there would be evidence to go to the jury of negligence on the part of the defendant; whether Mr. McDowell is responsible for this accident or not, in any degree, it is for the jury to decide. I think the defense of contributory negligence on the part of the deceased has been fully made out, in all views that may be taken of the case,

by the uncontradicted evidence and by the testimony of witnesses who were there and have been called as witnesses for the plaintiff. He was in a situation which required care on his part, as well as every man there, for his own safety and that of those who were working with him. If he knew that the wheel was about to be started in operation with the gas-pipe block in, that it was liable to cause injury to the machinery, or inflict an injury to himself or any person there, he was under obligation to check it. All he had to do was to say "Wait." One word would have been sufficient to delay the starting of the machine until he could have removed the pipe. He must be assumed to know that the gas-pipe was there, for according to the testimony, he put it there, and was in the best position for anyone to see it. He was the one who would have removed it if it had been removed, and in disregard of the warnings which orders had and which he could have heard if he had been paying attention, it must be assumed that he was for the time being inattentive, to permit the machine to be started without first removing the gas-pipe. That not doing so was negligence, and at least a contributing cause of the injury, if that piece of pipe caused the injury. I grant the motion.

To which ruling of the Court plaintiffs by their counsel then and there duly excepted, and hereby tender this, their bill of exceptions to the Court, to sign and seal, and the Court does hereby sign and seal the same.

[Instructions of the Court to the Jury.]

The Court then proceeded to charge the jury.

By the COURT.—Gentlemen of the Jury: The Court has decided that according to the uncontradicted evidence in the case there is no legal liability on the part of the defendant, and your verdict must be for the defendant. The Court prepared this verdict:

"We, the jury in the above-entitled cause, find for the defendant, having been so instructed by the Court."

Without leaving your seats, you may elect one of your number foreman, to sign the verdict.

To which judgment and decision of the Court and instructions to the jury, counsel for plaintiffs then and there, duly excepted, and hereby tender this their bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same.

And now in furtherance of justice and that right may be done, plaintiffs present the foregoing as their bill of exceptions in this case, and pray that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

BATES, PEER & PETERSON,
Attorneys for Plaintiffs.

[Order Approving, etc., Bill of Exceptions.]

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein; and it is further ordered that the model introduced in evidence,

marked Plaintiffs' Exhibit "A" and the pipe introduced in evidence and marked Plaintiffs' Exhibit "B" may be attached by the clerk thereto and are hereby made a part of same.

Done in open court at the February term, 1909.

Dated this 25th day of June, A. D. 1909.

C. H. HANFORD,
Judge.

[Verified.]

Defendant's Identification No. 1.

NORTHWESTERN IMPROVEMENT COMPANY.

Coal Dept.

N. P. General Office Bldg.,
Room 27.
C. R. CLAGHORN,
General Manager.

Office of General Manager:
TACOMA, WASH.

STATEMENT OF JOHN URICK, BLACKSMITH, MELMONT, 10/9/07.

On Saturday afternoon about 3:30 o'clock Hoski came over here to get the carpenter, Janoski and myself to go over to the washer to help fix the transmission rope. The first thing we did was to put a block and tackle on the rope tightener. Janoski went above where the fly-wheel is hung and fixed the rope and tackle. Then we lifted the rope tightener and spliced the rope. Janoski came down and helped with the splicing. Then when we were ready to tighten the rope he went above again and after letting down the rope tightener he took the rope and pulley off.

I heard Janoski tell the boss Hoski, "I will put a block in the fly-wheel." I don't remember whether the boss made a reply or not. After the work was finished Hoski went to the bunkers and started the machinery there. He was gone about ten minutes. When he came back he asked if everybody was ready. Janoski said "Yes, all right. Let her go." I am sure he said this. The boss rang the bell and the machinery started. I was watching the rope to see if any kinks got in it. The first I knew that anything had happened I heard a rattling in the fly-wheel which sounded like iron hitting against iron. I looked and saw Janoski fall to the floor we were on. He was unconscious when he was picked up by Supt. McConnell.

When the machinery began to slow down I saw the pipe fall to the floor. The pipe was badly bent when it fell. The next day—Sunday—I looked at the timbers sustaining the fly-wheel and saw the dent where the pipe hit as it was carried around. Janoski was the only man who was up where the fly-wheel is, so that if any one blocked the wheel he must have done so.

This is a true statement as I give it.

JOHN URICK.

[Endorsed.]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

This cause having been brought on regularly before the Court on this 25th day of June, 1909, upon

the application of plaintiffs for the settling and certifying of their proposed bill of exceptions lately filed herein, and the time for such settling and certifying of said bill of exceptions having been duly extended by order of the Court and by stipulation of the parties until and including this date, and the parties having agreed together in respect to the defendant's proposed amendments to said proposed bill of exceptions, and all of said amendments as far as insisted upon by the defendant, having been embodied in said proposed bill of exceptions as originally filed, with the consent of the parties and the Court;

Now, therefore, on motion of Bates, Peer & Peterson, plaintiff's attorneys,—

It is ordered, that said proposed bill of exceptions heretofore filed by the plaintiffs in this case, as the same now stands amended as aforesaid, be and it is hereby settled as the true bill of exceptions in this cause, and the same as so settled be now and here certified as agreed, by the undersigned, Judge of this Court, who presided at the trial of this cause, and that said bill of exceptions when so certified be filed by the Clerk.

C. H. HANFORD,
Judge.

[Verified.]

[Title of Court and Cause.]

Assignments of Error.

(AT LAW.)

Come now the plaintiffs and file the following assignments of error upon which they will rely upon their prosecution of the writ of error in the above-entitled cause from the final judgment made by this Honorable Court on the 30th day of March, 1909, and from the further order and judgment made by this Honorable Court on the 5th day of June, 1909, overruling plaintiffs' motion for a new trial in the above-entitled cause.

1.

That the United States Circuit Court in and for the Western District of Washington, Western Division, erred in sustaining the motion made to the Court upon the trial of said cause, and at the close of all the evidence and after the parties had rested, to direct the jury to return a verdict against the above-named plaintiffs in error and in favor of the above-named defendants in error.

2.

That the said Court erred in sustaining the first ground of the motion interposed by defendant in error, to the sufficiency of the evidence to sustain a verdict in favor of the plaintiffs in error, and by adjudging and deciding that the evidence failed to prove facts sufficient to sustain a verdict in favor of the plaintiffs in error.

3.

That the said Court erred in sustaining the second ground of said motion, and in adjudging and deciding that the evidence failed to show that the injury to John Janoski, plaintiffs' intestate, was occasioned through the fault or negligence of the defendant in error.

4.

That the said Court erred in sustaining the third ground of said motion, and in adjudging and deciding that the evidence showed that the injury was occasioned by the negligence of plaintiffs' intestate which contributed to the injury and was a proximate cause thereof.

5.

That the said Court erred in sustaining the fourth ground of said motion and in adjudging and deciding that the evidence shows that the injury was occasioned through the negligence of said John Janoski, in failing and refusing to obey the orders of the washer boss in placing an obstruction in the transmission wheel.

6.

That the said Court erred in sustaining the fifth ground of said motion, and in adjudging and deciding that plaintiffs' intestate failed to exercise ordinary care and caution for his own personal safety, and in adjudging and deciding that said John Janoski failed to exercise ordinary care and caution for his own personal safety.

7.

That the said Court erred in its judgment in grant-

ing said motion and in adjudging and deciding that according to the uncontradicted evidence in the case there was no legal liability on the part of the defendant in error, and in directing the jury to return a verdict for the defendant in error and against the plaintiffs in error.

8.

That said Court erred in entering a judgment in favor of the defendant in error and against the plaintiffs in error dismissing plaintiffs' action and adjudging costs to the defendant in error.

9.

That the said Court erred in overruling the motion for new trial interposed by plaintiffs in error, and in adjudging and deciding that plaintiffs in error were not entitled to a new trial of said action.

Wherefore, the said Josephine Janoski and Agnes Janoski, a minor, by Josephine Janoski, her guardian ad litem, plaintiffs in error, pray that the judgment of the Circuit Court of the United States for the Western District of Washington, Western Division, be reversed, and that the said Circuit Court be directed to grant a new trial of said cause.

BATES, PEER & PETERSON,
Attorneys for Plaintiffs in Error.

[Verified.]

[Endorsed]: No. 1768. United States Circuit Court of Appeals for the Ninth Circuit. Josephine Janoski, in Her Own Behalf and as Guardian Ad Litem of Agnes Janoski, a Minor, Plaintiffs in Error, vs. The Northwestern Improvement Company (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

Filed September 1, 1909.

F. D. MONCKTON,
Clerk.

No. 1768

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOSEPHINE JANOSKI and AGNES JANOSKI, by JOSEPHINE JANOSKI, her guardian ad-litem,
Plaintiffs in Error,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
Defendants in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

BATES, PEER & PETERSON,
Attorneys for Plaintiffs in Error.
Tacoma, Wash.

PRESS OF PUYALLUP VALLEY TRIBUNE.

No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOSEPHINE JANOSKI and AGNES JANOSKI, by JOSEPHINE JANOSKI, her guardian ad-litem,
Plaintiffs in Error,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
Defendants in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division.

STATEMENT.

This suit was commenced in the Circuit Court of the United States, Western District of Washington, Western Division, by filing the complaint therein on the 25th day of August, 1908.

The complaint sets forth in substance that the plaintiffs, Josephine Janoski, is the surviving wife, and

Agnes Janoski the surviving child of John Janoski, deceased; that the said John Janoski during his life time was employed by defendant as carpenter, electrician and machinist in and about defendant's coal mine in Pierce County, Washington; that defendant maintained a large transmission wheel about twelve feet in diameter over which a rope ran, furnishing the power to certain machinery in connection with defendant's coal mine (Plaintiffs' Exhibit "A"); that on October 5, 1907, the said John Janoski was directed by defendant's superintendent to assist in splicing the rope running on said transmission wheel, and in accordance with the orders of the superintendent went upon the elevated platform surrounding said wheel to remove certain twists and kinks from the rope on the top of the wheel, which were made in splicing the same, and also to remove a piece of two-inch pipe which had been stuck through the spokes of said wheel; and while he was engaged in said work the superintendent caused the power to be applied to said wheel and the same to be suddenly started without notice or warning to deceased, while he was occupying a dangerous position; that the wheel, pursuant to such orders of the superintendent, was started to revolve with great velocity, carrying the pipe around with it, striking deceased, causing him to fall, receiving injuries from which he afterwards died; that at the time of his said death he was of the age of thirty-seven years, earning wages at the rate of $120.00 per month; and demanded damages in the sum of $25,000.00 on account of his death; that on the same day, on a petition duly verified, the Court entered an order appointing Josephine Janoski guardian ad-litem of Agnes Janoski, a minor of the age of nine years. (Record, pp. 2-6.)

The answer of the defendant denied the allegations of negligence, and pleaded by way of a first affirmative defense that the accident was occasioned by reason of the negligence of the said John Janoski himself; and for a second affirmative defense that it was occasioned by the acts of fellow servants of deceased, for the consequences of whose negligence defendant was not liable; and for a third affirmative defense that the said John Janoski was familiar with the dangers and conditions which plaintiffs alleged were the cause of his injuries, and the same were open and obvious to him, and that he therefore assumed the risk of injury arising therefrom. (Record, pp. 6-10.)

The case was tried March 26, 1909, and at the close of all the testimony in the case, the defendant moved the Court to instruct the jury to find a verdict for the defendant upon the following grounds:

1. That the evidence failed to prove facts sufficient to sustain a verdict in favor of the plaintiffs.

2. That the evidence failed to show that the injury was occasioned through the fault or negligence of the defendant.

3. That the evidence showed that the injury was occasioned by the negligence of the plaintiff, which contributed to the injury and was the proximate cause thereof.

4. That the evidence showed that the injury was occasioned through the negligence of the plaintiff in failing and refusing to obey the orders of the washer boss in placing an obstruction in the transmission wheel.

5. For the reason that the plaintiff failed to exer-

cise ordinary care and caution for his own personal safety. (Record, pp. ——.)

After the argument on the motion and before the Court charged the jury, it rendered an opinion as follows:

"Assuming that Mr. McDowell was the vice principal, there would be evidence to go to the jury of negligence on the part of the defendant; whether Mr. McDowell is responsible for this accident or not, in any degree, it is for the jury to decide. I think the defense of contributary negligence on the part of deceased has been fully made out, in all views that may be taken of the case, by the uncontradicted evidence and by the testimony of witnesses for the plaintiff. He was in a situation which required care on his part, as well as every man there, for his own safety and that of those who were working with him. If he knew that the wheel was about to be started in operation with the gas pipe block in, that it was liable to cause injury to the machinery, or inflict an injury to himself or any person there, he was under obligation to check it. All he had to do was to say 'wait.' One word would have been sufficient to delay the starting of the machine until he could have removed the pipe. He must be assumed to know that the gas pipe was there, for, according to the testimony, he put it there, and was in the best position of anyone to see it. He was the one who would have removed it if it had been removed, and in disregard of the warnings which others had and which he could have heard if he had been paying attention, it must be assumed that he was for the time being inattentive, to permit the machine

to be started without first removing the gas pipe. That not doing so was negligence, and at least a contributing cause of the injury, if that piece of pipe caused the injury. I grant the motion."

And a verdict was accordingly returned under the directions of the Court against plaintiffs and for the defendant, and duly filed on March 30, 1909 (Record, p. 60), and judgment was entered upon the verdict dismissing plaintiffs' action (Record, p. 11), and plaintiffs' motion for new trial having been overruled this Writ of Error is prosecuted.

John Urick, a witness in plaintiffs' behalf, testified in substance:

That he was working at the mine, blacksmithing and helping around the machinery and all kinds of work, and with Janoski was requested by the bunker boss to assist in splicing the rope on the transmission wheel; that they prepared to do this by blocking the wheel with a piece of pipe, placing it through the spokes, either end resting upon the frame work surrounding the wheel. (Record, p. 15.)

Hosko, the bunker boss, McDowell, the superintendent, Janoski and Urick were all there, and they all agreed that they had to block the wheel. (Record, p. 15.)

The pipe was about eight feet long and was put in by Janoski himself. Hosko, the bunker boss, and McDowell, the superintendent, stood down below at the time, and there was nothing to prevent them seeing what Janoski was doing. It took about three-quarters of an hour to splice the rope, during all of which time McDowell, the superintendent, was there. (Record, p. 16.)

Janoski then went on top to straighten up the kinks in the rope and put the rope in the groove, so that when the wheel started the rope would run in the proper groove. If he did not do this it would tear up everything. While they were doing this Hosko said, "Watch yourselves," to the men who were working on the picking table down below in the washer house. After he said that, he stepped back toward the wheel and said to the superintendent, "Are you ready to start up?" The superintendent said he was, and to ring the bell. When this signal was given, Janoski was straightening up the kinks, the pipe was still in the wheel, and he was not ready for the wheel to start. When Hosko rang the bell, the engineer happened to be right near the clutch, and threw it on quickly, and the machinery started up all at once. The pipe bent and went around and struck Janoski on the head and knocked him down on the floor. (Record, p. 17.)

Before McDowell told Hosko to start the machinery, no one asked Janoski if he was ready to have it started. He was still working taking out the kinks. Janoski did not say anything showing he was ready for the machinery to start, or that he even knew it was going to start. (Record, p. 17.)

There was a cut several inches long on the left side of Janoski's head. The pipe, marked "Plaintiff's Identification B," also fell to the floor. Janoski never regained consciousness, and died the next morning about ten o'clock. (Record, pp. 17-18.)

The slate picking place was twenty-five or thirty feet to one side, from underneath the wheel. When Hosko told the rock pickers to look out, he was not underneath the wheel, but to one side, toward the pickers, and after

he told the pickers to look out, or watch themselves, he came back toward the wheel and McDowell told him to start up. (Urick, Record, pp. 18-20.)

George Dorke, a witness in behalf of plaintiffs, testified, in substance:

"I was picking slate or coal out of the rock at the time of the accident. My working place was twenty-five or thirty feet out from and to one side of a point underneath the wheel. There were present during the time the splicing was being done, John Janoski, John Jacobson, John Urick, Mr. McDowell, the superintendent, and Hosko." (Record, p. 24.)

"I finished my work about ten minutes before the work was completed. There were two Italians, named Frank and Mike, who were working down below me on the ground. The machinery was standing still while the splicing was being done, the same as the picking table about which I was working. Shortly before the machinery started, Hosko stepped over to the edge that is open, where he could see down below, toward where I was and toward where the other boys were, and he said, 'Watch yourselves,' and I said 'All right.' He was working around doing something for a few minutes, I don't know what, and then he said 'Watch yourselves' again. He came in there to see down below, and asked me for the other fellows, and I told him. He went down to the south end and hollered out for Mike and little Frank answered for him. Hosko started over toward the wheel and asked McDowell whether everything was ready to start. McDowell said yes, he thought everything was ready to start. Hosko went and pulled the wire which gave the signal to the engine room. Then

I heard something drop. I turned around and saw Hosko run for the wire to stop the machinery." (Dorke, Record, pp. 25-27.)

"When he said 'Watch yourselves' he was not by the machinery but was out toward us, I guess about twenty feet, toward the washing table. Janoski fell seventeen or eighteen feet." (Dorke, Record, p. 27.)

McDowell, the defendant's superintendent, a witness called in behalf of defendant, testified in substance, among other things:

That he was superintendent of the mine; that he was there when Hosko came back and said, "Ready to start," and somebody on the top floor said, "Yes"; that he did not know whether it was John Janoski said "Yes" or not. It sounded like his voice said, "Let her go"; that Hosko said "Watch yourselves" or "Vatch." He could not say it in English. Then he went to the bell rope and rang it; that he was standing directly under the wheel when Hosko did this; that Hosko said "Watch yourselves" loud enough so that the pickers at the picking table all said, "All right"; that as soon as the machinery started there was a racket in the wheel, and that he looked up in ten or twelve seconds and saw Janoski coming head first. That he did not see anything strike him, just saw him coming. He struck his head on the floor. He remained conscious about a minute and a half, then he became unconscious and never regained consciousness. That after the accident there was blood and hair on the gas pipe. (McDowell, Record, pp. 34-38.)

George Hosko, a witness in behalf of defendant, testified in substance:

"When I came back, after starting the little bunker up across the railroad track, I said, "Well, is it all right?' I asked this of McDowell, the boss. McDowell said it was all right. When McDowell said it was all right, I hollered for the men to watch themselves. I called to everyone to watch out. I called to the pickers, 'Watch yourselves, I am going to start the washers,' and then I pulled the cord. I remember now that McDowell told me it was all right. I never heard Janoski say anything before I started the engine. I heard Urick say, 'All right.' McDowell also said, 'All right.' I never heard anything from John Janoski. When Mr. McDowell told me it was all right, I supposed it was all right. Before the splicing began, I saw Janoski put the pipe in the wheel, and although I told him it was not necessary to block the wheel, he did so with the pipe and never took it out." (Hosko, Record, pp. 41-44.)

George Dorke, recalled as a witness for plaintiffs in rebuttal, testified substantially as follows:

"Hosko and I were at McDowell's house two or three evenings after John Janoski was killed. Hosko said that when he said 'Watch yourselves' he was talking to the rock pickers. He also said that when he said 'Watch yourselves' he was not addressing Janoski at all. He also said that at the time he was starting the engine he did not think or know anything about Janoski being up on the platform. When Hosko asked if they were ready, it was not Urick who said 'All right, go ahead.' No one said that except Mr. McDowell, the

superintendent; that Hosko himself blocked the wheel with a piece of wood two or three days before, while splicing rope." (Dorke, Record, pp. 51-52.)

John Urick, recalled by plaintiffs in rebuttal, testified substantially as follows:

"We spliced the rope on the Wednesday previous to the accident. On that day we blocked the wheel with the same pipe that was used when Janoski was killed. I put the pipe in myself. I put it in the same way as Janoski did when he got killed. I took the pipe out of the wheel and McDowell was there when the pipe was taken out and when the machinery started up again. The day Janoski was hurt, neither Hosko nor McDowell nor the engineer said anything to him about not putting the pipe in the wheel. When Hosko asked if everything was ready before he pulled the wire, I said it was all right because McDowell was there and said so." (Urick, Record, pp. 53-54.)

John Kukalis, a witness called in behalf of plaintiffs in rebuttal, testified in substance:

"I talked to Hosko, McDowell and Jacobson two or three days after Janoski was killed. In that conversation Hosko said when he said 'Watch yourselves' he was talking to the pickers and not to Janoski. He also said he did not think anything about Janoski being on the platform when he started the engine, and that McDowell was the one who said 'All right; go ahead,' as he, Hosko, asked if they were all ready. At that same conversation McDowell told me that for the minute he had forgotten that Janoski was up on the platform, and

that when he ordered the engine started he forgot all about Janoski being up there." (Kukalis, Record, p. 54.)

The trial court, in passing upon defendant's motion for a judgment of non-suit on the ground that the evidence of plaintiffs was not sufficient to entitle them to recover as against the defendant, for the reason that they had not proved the allegations of the complaint, and further, that there was no evidence of negligence on the part of the defendant, among other things said:

"Defendant's counsel said there was no evidence of negligence on the part of the defendant. There was negligence. It was a negligent thing to start that machinery until the bar had been withdrawn."

In the course of his decision, granting the motion for a directed verdict, the Court also said:

"Assuming that Mr. McDowell was the vice-principal, there would be evidence to go to the jury of negligence on the part of the defendant; whether Mr. McDowell is responsible for this accident or not, in any degree, it is for the jury to decide." (Record, p. 58.)

ASSIGNMENTS OF ERROR.

Title Omitted.

Come now the plaintiffs and file the following assignments of error upon which they will rely upon their prosecution of the Writ of Error in the above entitled cause from the final judgment made by this Honorable Court on the 30th day of March, 1909, and from the

further order and judgment made by this Honorable Court on the 5th day of June, 1909, overruling plaintiffs' motion for a new trial in the above entitled cause.

I.

That the United States Circuit Court in and for the Western District of Washington, Western Division, erred in sustaining the motion made to the Court upon the trial of said cause, and at the close of all the evidence and after the parties had rested, to direct the jury to return a verdict against the above named plaintiffs in error and in favor of the above named defendant in error.

II.

That the said Court erred in sustaining the first ground of the motion interposed by defendant in error to the sufficiency of the evidence to sustain a verdict in favor of the plaintiffs in error, and by adjudging and deciding that the evidence failed to prove facts sufficient to sustain a verdict in favor of the plaintiffs in error.

III.

That said Court erred in sustaining the second ground of said motion, and in adjudging and deciding that the evidence failed to show that the injury to John Janoski, plaintiffs' intestate, was occasioned through the fault or negligence of the defendant in error.

IV.

That the said Court erred in sustaining the third ground of said motion, and in adjudging and deciding

that the evidence showed that the injury was occasioned by the negligence of plaintiffs' intestate wihch contributed to the injury and was a proximate cause thereof.

V.

That the said Court erred in sustaining the fourth ground of said motion, and in adjudging and deciding that the evidence showed that the injury was occasioned through the negligence of said John Janoski in failing and refusing to obey the orders of the washer boss in placing an obstruction in the transmission wheel.

VI.

That the said Court erred in sustaining the fifth ground of said motion, and in adjudging and deciding that plaintiff's intestate failed to exercise ordinary care and caution for his own personal safety, and in adjudging and deciding that said John Janoski failed to exercise ordinary care and caution for his own personal safety.

VII.

That the said Court erred in its judgment in granting said motion and in adjudging and deciding that according to the uncontradicted evidence in the case there was no legal liability on the part of defendant in error, and in directing the jury to return a verdict for the defendant in error and against the plaintiffs in error.

VIII.

That said Court erred in entering a judgment in favor of the defendant in error and against the plaintiffs

in error dismissing plaintiff's action and adjudging costs to the defendant in error.

IX.

That the said Court erred in overruling the motion for new trial interposed by plaintiffs in error, and in adjudging and deciding that plaintiffs in error were not entitled to a new trial of said action.

ARGUMENT.

While we have made several assignments of error, they may all be discussed together under Assignment No. 4, directed to the action of the Court granting defendant's motion against plaintiffs, on the grounds that plaintiffs' intestate was guilty of contributory negligence which contributed to the injury and was the proximate cause thereof.

We contend, first, that under the testimony in the case the question of contributory negligence on the part of plaintiffs' intestate presented one of fact for the jury; and, second, that if plaintiffs' intestate was negligent in being in a place of danger at the time of the accident, defendant's negligence was in point of time such that under the circumstances it became the sole, legal cause of the damage.

On the first proposition we call attention to that part of the trial Court's opinion wherein he said:

"If he (referring to Janoski) knew that the wheel was about to be started in operation with the gas pipe block in, that it was liable to cause injury to the machinery, or inflict an injury to himself or any person there,

he was under obligation to check it. All he had to do was to say, 'Wait.' One word would have been sufficient to delay the starting of the machine until he could have removed the pipe."

The question of contributory negligence on the part of plaintiffs' intestate on the one hand, and the question of defendant's negligence on the other, in this case depend entirely upon the knowledge of the respective parties.

We think that we are justified, without citing authority, in stating that it is a well established principle of law that knowledge on the part of the plaintiff as to the danger to which he is exposed, or a legal obligation to know of it, is an essential element to fix contributory negligence on him, and likewise it also is in fixing negligence upon the defendant.

Viewing the testimony in the case at bar in the light of this principle, it becomes apparent at once by an overwhelming preponderance of probability, that the fault of this unfortunate accident rests upon the defendant. For the purpose of argument we will concede that in so far as the dangers incident to the general employment were concerned, McDowell, the superintendent, and Janoski stood on the same footing.

The testimony to which we have heretofore referred, shows that McDowell, the superintendent, knew that Janoski was upon the wheel. If it was dangerous to start the wheel without warning him, McDowell also knew that fact. He knew that Janoski was there performing a duty. He knew that when the warning was called out to the pickers Janoski made no response. He did not know whether Janoski had heard the warning or not, or,

if he had heard it, whether or not he had gotten into a place of safety, and yet McDowell started the machinery.

On the other hand, if it was dangerous to start the machinery while Janoski was on the wheel, Janoski knew that fact, but the record is absolutely silent and contains no proof whatever of any knowledge on the part of Janoski regarding the pendency of the danger which beset him. On the contrary, we contend that his conduct and actions while the warnings to the pickers were being given, show conclusively that if he heard them he knew they were not for him, and that the final conversation between Hosko and McDowell, occurring after the warnings to the pickers, and resulting in McDowell's ordering the immediate starting of the engine, was something Janoski never heard at all. The material injuiry, therefore, is: *Did he know that the machinery was going to start* AT THE TIME IT DID START, *and, if he* DID *know, did he have ample time,* AFTER RECEIVING SUCH KNOWLEDGE, *to get into a place of safety before it was started?*

It is manifestly apparent from the testimony that at least the first two warnings given were not heard by some of the men down below and about the picking table. The testimony also shows that the superintendent who caused the machinery to start had momentarily forgotten about Janoski; that the warning was given to the men on the picking table and repeated until they all answered "All right."

If it was necessary to repeat these warnings until a response came from the men to whom they were addressed, so that the superintendent might know that they were advised of such intention, why was it not necessary to have a response from Janoski, to whom no

warning was addressed, and who, as the superintendent well knew, was occupying a most hazardous position? If the superintendent had not momentarily forgotten him, is it not inconsistent to contend that he would call three times to get a response from other men there before starting up, and then proceed to start up without any response whatever from Janoski, or without any assurance that he received the warning or knew the machinery was about to start? It seems to us that different conclusions may reasonably be drawn from these facts and circumstances. For instance, it may be reasonably inferred that Janoski heard the warning given the others, and continued with his own work, counting and calculating that under the peculiar circumstances, no start would be made until he had fully completed his work, and that the warning was not intended for him at all. Might it not also be reasonably inferred that even if he heard the warning to the others, he did not have sufficient time, after realizing that a start was really to be made, to get to a place of safety before the starting of the machinery, and, therefore, the calling to the pickers, which he had not deemed any signal to him of an immediate start, availed him nothing; and might it not also be reasonably inferred that, being engrossed with his work and having no occasion to expect such a signal, he did not hear the warning at all, or at least did not hear anything that he accepted as notice to him of an immediate start?

These are some of the questions that we think must be submitted to a jury on the testimony, for them to find as a matter of fact, and not for the Court to decide as a matter of law, whether or not plaintiffs' intestate was guilty of contributory negligence.

It appears that several minutes had elapsed between the first and last times Hosko called out "Watch yourselves" to the pickers and men below. Even if it be conceded that Janoski heard or should have heard each of these three calls, we contend that it in no wise rendered him guilty of contributory negligence or diminished the liability of the defendant.

The persons for whose benefit and protection Hosko gave these calls, had been working on and around machinery that was standing still during the rope splicing, but which would be put in motion the minute the transmission wheel was started. They had been interrupted and stopped, and they were awaiting the completion of the splicing so as to resume their work. They had no personal part in the making of the repairs, and some of them were so located that they could not know of the progress of the work, and to them some personal notice had to be given of its completion. They were on floors below and out of sight of the man who would start the wheel, and, accordingly, unless warned in advance, would be subjected to greater danger of serious personal injury. Under the circumstances, it was incumbent upon them to pay attention to the starting of the machinery, and to heed whatever notice or signal they might receive that a start was about to be made. The warning that was intended for and given them was undoubtedly sufficient for their purposes, and had any one of them been injured through a failure on his part to heed the warning, there would have been no liability on the part of the company.

Not so, however, in the case of Janoski. He was the machinist and general repair man around the mine, and when, in the presence and under the directions of the

superintendent, he was engaged in splicing the rope, he was fulfilling one of the duties of his employment.

Before the splicing began, it was agreed between McDowell, Janoski and others engaged in the work, that it was necessary to block the wheel, and accordingly, in the presence of all, Janoski put the pipe through the wheel. After the splicing was finished and while the superintendent was still present and overseeing the work, Janoski went up on the platform to put the rope on the wheel, to let the tighteners down, to take the kinks out of the rope, and to take the pipe out of the wheel. Each and every one of these things had to be done before the machinery was ready to start.

As it was to require but a few minutes to do these things, after which the machinery would be started, the time had come to notify the other workmen about the other machinery of the plant, and, accordingly, following the superintendent's orders, Hosko began calling out to the pickers below, and continued calling out, at intervals, for several minutes, until it was known that all the pickers had been warned. What if Janoski did hear Hosko call to the pickers "Watch yourselves"? That was merely a notice to the pickers that things were being gotten in readiness and that a start was about to be made. It meant nothing to Janoski himself. He was working upon the very thing that had caused the suspension, and, at the time of the accident, was up on the platform engaged in doing something that had to be completed before the wheel could safely start. McDowell knew all this, and also knew that Janoski was the only person on the platform attending to these last items of work to be done before the wheel should be put in motion.

True, Janoski had to use certain care for his own safety, but he was required only to guard against injury from ordinary causes. The law did not impose upon him the duty of keeping a lookout for dangers arising from such an extraordinary source as the sudden and unannounced starting by the master of the machinery upon which he was working at the time. When the superintendent sent him upon the platform to do the work in which he was engaged when dashed to his death, he had a perfect right to assume that the condition of his working place would remain the same while he was thus engaged, or, if the dangers of the place were to be increased, that he would receive personal, positive and timely warning of such change. The warning to the pickers was not, under the circumstances, any warning to him. He was not through with his work, he was still taking kinks out of the rope on the top of the wheel. The pipe had not yet been removed; he was not yet ready for the engine to start; the reason for the stoppage of the machinery had not yet been removed; he was remedying it, and he had no reason to suppose that it would be started until the repairs upon which he was working had been fully completed. The superintendent, who was directing the giving of warnings to the pickers, stood on the floor directly underneath where Janoski was at work, where he could see Janoski's every movement and constantly note the progress of the work. He could see Janoski still straightening out the kinks, and could see that the pipe was still through the wheel. Under such circumstances, not even the most apprehensive mind, much less an ordinarily cautious one, would have conceived that McDowell could possibly be guilty of such an awful lapse as to order the machinery started. Ac-

cordingly, when the trial Court charged Janoski with being inattentive and negligent in not yelling "Wait," simply because he may have heard Hosko yell "Watch yourselves" to the pickers located in a more distant part of the building, it seems to us that he made a ruling forfeiting plaintiffs' rights which was in nowise warranted by the law and evidence in this case. The part of the conversation between McDowell and Hosko that it seems irresistible Janoski did not hear, and the part that caused the catastrophe, was when, after having made the various calls to the pickers, Hosko walked back nearly to the wheel and asked McDowell if he was ready to start, and McDowell said he was and ordered the start to be made. Hosko himself pulled the bell wire to the engine room, and the wheel suddenly started. These facts are admitted. Nor is it claimed that any other or different signal or order to start was given immediately before the machinery started. This conversation between McDowell and Hosko was in an ordinary tone, with the two men but a very few feet apart, and evidently intended by them for no one else, not being addressed to Janoski or anyone else, and, occurring as it did, down on the floor where some half dozen men were working, moving about and presumably talking more or less, as they had been doing all the time, all causing considerable noise, in addition to the sounds about a place of that character, while Janoski was up on the platform, absorbed in the work he was doing, removing the kinks from the rope on top of the wheel, we think that under such circumstances it is not only highly improbable that Janoski heard the order from McDowell to Hosko to start the engine, but when his action at the time is considered, we contend that as a matter of fact it is most conclu-

sive that he never heard their final conversation at all. The positive testimony of Urick, who was standing right under the wheel, holding the rope, assisting Janoski to remove the kinks, and looking right at him as he worked, is, that when McDowell told Hosko to start up and the wheel instantly started revolving, Janoski was busy with his work, leaning over the top of the wheel, removing the kinks from the rope. Although, owing to the fact that the wheel started at practically the same instant that McDowell gave the order, Janoski would have had no opportunity to escape danger, even if he had heard the order, still would not he, an experienced man, one quickly appreciative of the danger confronting him, have shrieked out or made some sound or motion that would have told Urick, who was looking up at him, that he heard, although too late? The fair, reasonable mind will entertain but one answer, which, declaring that Janoski never knew his impending danger, absolutely refutes the presumption indulged in by the trial Court and upon which he founded his decision. In addition to this, the natural human instinct, when confronted with pressing danger, is to take some instant action for self-preservation, and in cases of such character, there is, in the absence of positive proof, a presumption or inference of fact derived from the observation of the ordinary conduct of one in circumstances of danger, that the person in such a situation will exercise reasonable care for his own safety, and this presumption or inference may ordinarily stand in the place of positive proof, so as to support the burden of proof which, in ordinary cases, is to be overcome by direct affirmative testimony. The fact that Janoski took no such action, raises a legal inference or presumption that he had no knowledge of his

dangerous situation, without which knowledge he could not, under any circumstances, be guilty of contributory negligence.

The rule of law entitling plaintiffs to this presumption in this case is well illustrated and supported by the case of *Washington & Georgetown Ry. Co. vs. Gladmon,* 82 U. S. 401, 21 L. Ed. 82; also Buswell on Personal Injuries, §136, citing numerous cases.

There being no proof of any kind whatever that Janoski in fact had knowledge that the wheel was going to start when it did, the trial Court, in declaring Janoski guilty of contributory negligence on the ground that he did, and in directing a verdict against plaintiffs, necessarily PRESUMED and INFERRED that because someone else, differently situated, heard a general warning, Janoski either knew or should have known that the wheel was going to start while he was in a hazardous position.

We contend that not only the rule of law above referred to, but also under the doctrine defining the province of a trial court in ruling upon a motion for a directed verdict, the action of the Court was precisely the reverse of what it should have been.

"The motion to direct a verdict should be denied if there is substantial evidence supporting plaintiff's case, *no matter how strong the opposing evidence is.* The latter should be *entirely ignored* as much as if it were out of the case, and the attention of the Court should be confined to the evidence *favoring plaintiff's* case. It is the *jury's province* to make the comparison. It is *never* the *Court's* province to do so, except after verdict on a motion to set it aside and grant a new trial."

Jenkins & Reynolds Co. vs. Alpena Portland Cement Co., 147 Fed. 641

"It is the duty of the Court, when the motion is made to direct the verdict, to take that view of the evidence *most favorable to the party against whom it is desired verdict should be directed,* and from that evidence and the *inferences reasonably and justifiably to be drawn therefrom,* determine whether or not a verdict *might* be found for that party."

Mt. Adams Co. vs. Lowery, 74 Fed. 463.

Instead of PRESUMING or INFERRING that Janoski DID KNOW his danger, the Court should have INFERRED and PRESUMED that Janoski DID NOT have such knowledge. Instead of indulging in any inferences or presumptions in plaintiffs' favor, the Court, disregarding his duties under the law, resolved against plaintiffs, every doubt, inference and presumption reasonably or justifiably to be deduced from the evidence, and in so doing committed the error herein appealed from.

On the second proposition, we contend that the evidence in this case presented such a case of culpable negligence, that, under the rule prevailing in the Federal Courts, plaintiffs were entitled not only to have their case submitted to the jury, but to have an instruction directing a verdict in their behalf, the amount of which, of course, to be determined by the jury.

In passing upon the motion for judgment, the Court lost sight of the principle of law *that the fault of one who, acting, can at the time, but who does not prevent the injury, is its sole legal cause, regardless of how the dangerous situation was created, or, as is sometimes said,*

although the plaintiff is in some degree negligent, he can nevertheless recover, if the defendant, by reasonable care, could have avoided the consequences of the plaintiff's negligence. Instead, the Court proceeded, as we have shown, upon the theory (itself intrinsically wrong and erroneous), that plaintiffs' intestate was guilty of contributory negligence, and that, because he was guilty of negligence in getting into and remaining in a position of danger, the superintendent of the mine was not under obligation to avoid injuring or killing him, whether he could have avoided doing so or not.

The sole support of the defense of contributory negligence consisted in the Court's ASSUMING that because the pickers heard the cautions "Watch yourselves," Janoski must either have heard them and disregarded them, or, if he did not hear them, that it was due to his own inattention. There is no claim that he was given any personal warning or that he signified in any way whatever that he heard the warnings that were given the others. McDowell must have seen him still at work, with the pipe still in the wheel, wholly oblivious to his own danger that the starting of the machinery would cause, and in spite of all that, McDowell, though well knowing the inevitable result, ordered the engine started.

If there was ever a more glaring instance of wanton criminal negligence, it has failed to attract our attention. Suppose, instead of giving the warning as done, McDowell had looked up and said "Janoski, look out, I am going to start." Suppose Janoski had said nothing, and McDowell had repeated the warning twice more, in the same manner. Suppose Janoski had still made no response, and in no way indicated that he heard, but had

kept right on with his work and with the pipe still in the wheel, in the same way as he did on that fatal day. Suppose that under those circumstances, and realizing Janoski's dangerous position, McDowell had nevertheless ruthlessly ordered the wheel started, and Janoski had been knocked off and killed, precisely as he in fact was, can it be contended for a moment that the defendant would be excused on account of the contributary negligence of Janoski in failing to heed the warning?

If, under such circumstances, the defendant would still be held liable, despite the negligence of Janoski, of how much less avail should the defense of contributory negligence have been to the defendant under the facts of this case?

A conclusive refutation of the Court's action regarding this branch of the case is found in the recent expressions of the Courts of last resort throughout the United States. In this connection, we will content ourselves with calling the Court's attention to the following leading authorities:

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408.
Inland, etc., Co. vs. Tolson, 139 U. S. 551.
Finnich vs. Boston & N. St. Ry Co., 4 St. Ry. Rep. 437; 77 N. E. 500.
Hanson vs. Manchester St. Ry. Co., 4 St. Ry. Rep. 690, and cases there cited; 62 Atl. 595.
Degel vs. St. Louis Transit Co., 1 St. Ry. Rep. 460; 74 S. W. 156.

The principle is most clearly defined by the following extract from the last case above cited:

"It is a familiar and well-established legal principle

that, although a person may have negligently exposed himself to danger, the duty still remains to refrain from killing or injuring him. The general rule may be deduced that a party plaintiff who has placed himself in a dangerous position, where injury is likely to result, and does ensue, notwithstanding such negligence on his part, may still recover for such injury, if he can establish that the defendant knew, or by the exercise of reasonable diligence could have known, of plaintiff's peril in time to avoid injuring him, and failed to exert reasonable care by which such injury might have been averted. * * * The case falls within the now well-established exception in the law of negligence permitting a recovery, notwithstanding the contributory negligence of the party injured, if defendant, after seeing the party in danger, or where such duty was imposed upon defendant, by the exercise of ordinary care, might have seen him in time, and averted the accident, failed to do so. If defendant's motorman saw, or by the exercise of ordinary care could have seen, the peril of plaintiff, even though caused by her own contributory negligence, in time to avoid injury to her, the plaintiff was entitled to recover, and her failure to look and listen for the colliding car was no bar."

By applying these principles to the facts in this case, the liability of the defendant is made most plain. Conceding that Janoski may have been negligent in disregarding or failing to hear the warning given, this was followed by an absolute lack of ordinary care on the part of McDowell, which, if exercised, would instantly have shown him Janoski's peril and compelled him to withhold the starting of the wheel until Janoski was off

the platform or to a place of safety. This utter failure or disregard of duty on McDowell's part was (under the above rule of law, the sole and proximate cause of the accident, and constituted such negligence as will render the defendant liable, regardless of any prior negligence on the part of Janoski.

For the reasons herein set forth, we earnestly contend that the judgment of the trial Court should be reversed and the cause remanded for a new trial.

Respectfully submitted,

BATES, PEER & PETERSON,

Attorneys for Plaintiffs in Error.

No. 1768

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

JOSEPHINE JANOSKI and AGNES JANOSKI, by JOSEPHINE JANOSKI, her guardian, *ad litem*,
Plaintiffs in Error,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Defendant in Error

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Brief of Defendant in Error

Supplementing the statement contained in the brief of Plaintiffs in Error, we desire to call the attention of the court to certain facts omitted from that statement.

The platform around the transmission wheel was about four feet wide. Concerning it Superintendent McDowell testified on redirect examination: "It is not

dangerous to a person upon that platform to have the machinery start. The sidewalk is four feet wide and you can walk all around the wheel. You can go up and go around the wheel when it is in motion at any time." (Record, p. 39.)

The evidence shows that after the workmen had finished splicing the rope the deceased went up on this platform for the purpose of lowering the tightener. After the tightener was lowered Hosko, the washer boss, went over to the bunker, a distance variously estimated by the witnesses to be from 200 to 300 feet, and started the machinery there. When he returned, after being gone about ten minutes, and before starting the machinery which set in motion the large wheel on which the rope was being spliced, he gave timely and sufficient warning to the workmen.

John Urick, one of plaintiffs' witnesses, testified: "Before Hosko started to pull the bell wire to start the machinery he said to the fellows at the picking table, which was 25 or 30 feet from the wheel, 'Watch yourselves' (Record, p. 18), and after that Hosko inquired of the men who were around the wheel if they were ready to start, when Superintendent McDowell and the witness both answered they were."

Counsel for plaintiffs, fearing that he had not made this matter sufficiently plain to the jury, recalled this witness on rebuttal, and the following are the questions and answers:

"Q. To see that we understand each other, I will ask you the question again. At that time, after Hosko

had told the boys to 'Watch yourselves,' as he said he did, after he said 'Watch yourselves' and came back and asked if everything is all right, who said 'All right, go ahead'?

"A. McDowell and I said it.

"Q. You said it and McDowell both?

"A. Yes." (Record, p. 53.)

George Dorke, another of plaintiffs' witnesses, testified, concerning the warning given by Hosko before starting the wheel, as follows:

"He said, 'Watch yourselves,' and I said, 'All right.' He was walking around doing something for a few minutes, I don't know what, and walking toward the south end of the coal bunker. He said 'Watch yourselves' again. He came in there to see down below and asked for the other fellows, and I told him Frank was on the rock pile doing something, and he hollered out to Frank to come in and Frank did so. After that he came down the third time and did not see all of us, as little Mike was down below yet. He was going to the south end again, and hollered out for Mike, who was working on the dumping pile, and he, Mike, was coming up the ladder to the south end, and little Frank answered for him. Hosko started off towards the wheel and asked McDowell whether everything was ready to start. McDowell said yes, he thought everything was ready to start. Hosko went and pulled the wire." (Record, p. 25.)

On cross-examination this witness testified that when Hosko called "I could hear him plainly, and if Janoski was up on the wheel he could have heard if he had been up there. It was a few minutes before he called out the second time. The second time he said 'Watch yourselves' as loud as the first time. I heard him all right. I suppose the rest heard it the same as I did. It was maybe two or three minutes before he called the third time. I

answered him the first time he called. The last time he called the little Italian, Frank, answered. He was down on the floor where I was, about 14 or 16 feet from me, and that much distant further from Hosko than I. He said, 'All right.' The third time Hosko gave us the call he asked for little Mike, and little Frank answered for Mike, who was coming up the ladder. Then Hosko went toward the wheel and asked McDowell if everything was all ready. McDowell was standing by the rope at that time. I heard him ask McDowell if everything was all right, and McDowell said, 'Yes.' After McDowell said 'Yes' the machinery was started." (Record, pp. 26 and 27.)

Superintendent McDowell testified that after the tightener was let down Hosko went over to the bunker to start the machinery there and was gone about ten minutes, and when he came back he said, "Ready to start?" and someone on the top floor said, "Yes." "I do not know if it was John Janoski, but it sounded like his voice. Hosko called out two or three times, 'Watch yourselves.' He said 'Watch yourselves' loud enough that the pickers at the picking table all said 'All right.' They were fifty-six feet away. I measured the distance yesterday." (Record, pp. 35 and 36.)

John Jacobson, one of the men who was assisting in splicing the rope, testified as follows:

"After the rope was spliced, Hosko went to the bunker to start the machinery and was gone ten or eleven minutes. When he came back he asked if it was all right to start. I heard someone, I did not notice who it was, say it was all right. When someone said it was all right, Hosko went to the bell string. Before he started the bell

I heard him say, 'Watch yourselves' twice. He said it loud enough that Janoski could hear it. He was closer to Janoski than he was to the pickers down below. I did not notice that the gas pipe had been put in the wheel. I helped all the time they were splicing the rope." (Record, pp. 44 and 45.)

ARGUMENT.

From the uncontradicted evidence of witnesses for both the plaintiffs and the defendant, it appears that sufficient and timely warning was given so that all, including the deceased, could hear the warning before the machinery was started. The deceased had gone up on the platform surrounding the wheel for the purpose of letting down the tightener and performing whatever was necessary to put the machinery in order for the purpose of starting. He had been up there fully ten minutes before the warnings were given and the machinery started. He was not "on the wheel," as stated by counsel for plaintiffs in error in their brief, but he was on a platform four feet wide around the wheel. He was not in a dangerous place, but a place that was perfectly safe unless it had been rendered dangerous by the act of the deceased and not by any act of the defendant.

It was shown that Hosko was exceedingly careful to warn everybody who could be in any possible danger by reason of the starting of the machine before he caused the same to be started. According to the plaintiffs' theory, he called three times to the pickers, who were on the floor below and out of range of his vision, "Watch yourselves," and in addition to that made special inquiry concerning them. That these warnings were in a tone of

voice loud enough that the deceased could hear is not denied, but, on the contrary, is admitted by all the witnesses; that they were given a sufficient length of time before starting the machinery to enable the deceased to notify Hosko that he was not ready is shown by plaintiffs' own testimony.

It was not necessary for Hosko to go to each individual and ask him if he was ready and wait until such individual gave an affirmative response before starting the machinery. All that was required was to use ordinary care to give sufficient and timely warning that the machinery was about to be set in motion, and if the warning was given such as the deceased could and should have heard, the Superintendent was justified in believing that he did hear it and was ready for the machinery to be started. As stated in *Willis vs. The Aspotogan,* 49 Fed. 163:

"A careful examination has satisfied me that the charge of negligence is not sustained. What the mate did was proper and usual under the circumstances. It was necessary to remove the cleats and it was customary to do it as he did. The testimony seems to leave no room for doubt that he gave ample and repeated warnings that he was about to do it, which the other workmen heard and obeyed. The mate was justified in believing the libelant would also heed it."

In the case of *Lobstein vs. Sajatovich,* 111 Ill. App. 654, the question of whether the warning given was heard and understood by the servant is discussed at considerable length. In the opinion the court said:

"But, as to this, the contention is not so much that appellant did not tell his employes to keep off the masons'

platform, but that it is not shown that appellee or the others heard or understood this order to suggest risk or danger; that appellee may not have heard, and if he did hear, may not have understood. * * * If, however, he heard or ought to have heard the order, appellee was not justified in disobeying it, merely because appellant did not go into details. Appellee's attorneys suggest that this warning was given not only because appellant regarded the scaffold as dangerous, but because he did not want his workmen to make use of a scaffold built by another contractor. If it be true that the warning was given, we think, sufficient notice to all the employes who heard it, and the evidence preponderates that if appellee did not hear, he could and ought to have done so."

And again, in the opinion:

"Appellee does not deny that he could have understood the master's order referred to. He says he did not hear it at all. We need not, therefore, pursue the inquiry as to whether he would have understood if he had heard. The preponderating evidence is that the order or warning was given, and that he was where he could and should have both seen appellant and heard him as did the others. In this respect, appellant seems to have performed all the duty which could be reasonably required of him in this case."

In *Stratton et al. vs. Nichols Lumber Co. et al.*, 39 Wash. 323, on this question the court said (page 336):

"The mill, therefore, must have been running for a considerable time before deceased was caught in the set screw. In any event, he had ample notice of the starting of the mill by the giving of the signal, which could be readily heard where he was working."

So, in this case, sufficient warning was given which the deceased heard or could have heard, and, as stated by the trial court, if he was not ready he had only to say "Wait," or in any other manner notify the men who were on the floor below him that he was not yet ready.

Counsel for plaintiffs in error in their brief say that it seems that different conclusions may reasonably be drawn from the facts and circumstances, and, "for instance, it may be reasonably inferred that Janoski heard the warning given the others and continued with his own work, counting and calculating that, under the peculiar circumstances, no start would be made until he had fully completed his work, and that the warning was not intended for him at all." How can it be contended that the warning was not intended for the deceased as well as for all the others? The warning was, "Watch yourselves," which implied that the machinery was about to be set in motion and sufficiently notified the deceased of that fact. He could draw no other conclusion from the character of the warning given. Counsel in their brief say, further: "Might it not also be reasonably inferred that, even if he heard the warning to the others, he did not have sufficient time, after realizing that a start was ready to be made, to get to a place of safety before the starting of the machinery, and, therefore, the calling to the pickers, which he had not deemed any signal to him of an immediate start, availed him nothing?" There are two answers to this contention of counsel: First, the deceased was already in a safe place unless it had been rendered unsafe by his own act, and he had been on the platform a sufficient time to have removed the piece of gas pipe before the warning was given; second, plaintiff's own evidence shows that he did have sufficient time after the warning was given to have removed the obstruction in the wheel or to have notified Hosko and the Superintendent that he was not ready for the machinery to be set in motion.

And counsel further inquires, "And might it not also be reasonably inferred that, being engrossed with his work and having no occasion to expect such a signal, he did not hear the warning at all, or at least did not hear anything that he accepted as notice to him of an immediate start?" This question of counsel is fully answered by the authorities heretofore cited. It was the duty of the deceased to give proper heed to the warnings given.

Counsel for plaintiffs in error admit the weakness of their position by suggesting certain inferences which *might* be drawn from the evidence and which *might* be sufficient to show negligence on the part of the defendant if left to the *guess* of the jury. Negligence must be proven by the evidence and not left for the jury to *suppose* or *guess* at.

As stated in *Armstrong vs. Town of Cosmopolis,* 32 Wash. 110, at page 114:

"But while it is true that the weight of the testimony is entirely for the jury, yet speculation and conjecture must not be confused with legitimate testimony. There are many theories which might be advanced which would be mere guessing, that would be as reasonable as the theory contended for by appellants."

And again, in *Paten vs. Texas & Pacific Ry. Co.,* 179 U. S. 658, 21st Sup. Crt. 275, at page 277, the court said:

"That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which

the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

The most that can be said of the position taken by counsel for plaintiffs in error is that they desired the jury to *guess* that the defendant was guilty of negligence, and to *guess* that the deceased was not guilty of contributory negligence, and to *conjecture* and *speculate* as to why the deceased did not heed the numerous warnings which were admittedly given.

The authorities cited in the brief of plaintiffs in error are not applicable to the facts presented in this case. They apply to cases where the defendant knew that the injured party was in a dangerous position where injury was likely to result, and, therefore, a duty rested upon the employer to avoid purposely or negligently inflicting an injury. The evidence in this case clearly shows that the only person who knew that the piece of gas pipe was in the wheel was the witness Urick, and he admits that after Hosko had given the warnings and then inquired of those at the wheel if they were ready to start he himself notified Hosko that they were ready.

Superintendent McDowell testified that he was not present when the work of splicing the rope was begun,

and did not know that the gas pipe had been placed in the wheel.

Jacobson, who assisted in splicing the rope, testified that he did not know that the gas pipe had been placed in the wheel.

The evidence shows that Hosko, after the deceased went upon the platform to lower the tightener, went away to a distant part of the building and was gone about ten minutes, so no one but Urick knew that the gas pipe was in the wheel, and Urick notified Hosko that they were ready to start; so, if the deceased was injured through the negligence of any person other than himself, it was the negligence of Urick, who was a fellow servant.

We respectfully submit that there was no evidence that would justify the Court in submitting the case to the jury, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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J. W. QUICK,

Attorneys for Defendant in Error.